Date Issued: 09-JUN-2023 **Yeshiva University** Page: 2

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Avraham Snider
Last 4 SSN: *****8639
Date of Birth: 08-JAN
Level of Study: **First Professional**

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
Institution Information continued:					
Ehrs:	13.000	QPts:	7.334		
GPA-Hrs:	2.000	GPA:	3.667		
Winter 2023					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7308	Rep. in Mediation-Jan. Session White, David	2.000	B+	
Ehrs:	2.000	QPts:	6.666		
GPA-Hrs:	2.000	GPA:	3.333		
Spring 2023					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7056	Securities Regulation Schroeder, Jeanne	3.000	A-	
LAW	7211	Jurisprudence Stone, Martin	2.000	A-	
LAW	7753	Prof. Responsibility Sebok, Anthony	3.000	A-	
LAW	7769	Fed Crim Pros SDNY Field Clnc Bagliebter, Jamie	2.000	P	
LAW	7770	Fed Crim Pros SDNY Fld Cl Sem Bagliebter, Jamie	2.000	P	
LAW	7926	Jrnl of Conflict Res Board Schneider, Andrea	1.000	P	
Ehrs:	13.000	QPts:	29.336		
GPA-Hrs:	8.000	GPA:	3.667		

********** END OF TRANSCRIPT **********

CARDOZO
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BROOKDALE CENTER - 55 FIFTH AVENUE - NEW YORK, NY 10003-4391

Michael Herz
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April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am delighted to write on behalf of Avraham (Avi) Snider, Cardozo '23, who has applied to you for a clerkship. Avi was a student in my Administrative Law class and I am also the faculty supervisor for his journal note. I have come to know him well and recommend him with enthusiasm.

Avi has done extremely well at Cardozo in everything he has undertaken. He will likely graduate right around the top 15% of the class, was on the 1L Honor Roll, is the Senior Articles Editor of his journal (the *Cardozo Journal of Conflict Resolution*), was a finalist in our internal Moot Court competition, produced a really interesting Note, and was selected as a Teaching Assistant by his Contracts professor (a real put-your-money-where-your-mouth-is kind of endorsement). He summered, and later this year will be an associate, at Weil, Gotshal. Concededly, the exam Avi wrote for me was very good but not great. But a single exam only tells you so much. His overall performance and the conversations I have had with him outside of class round out the picture. In short, there is just no question about his ability to do the work.

My closest contact and most in-depth discussions with Avi have concerned his Note, *The Democratic Case for Negotiated Rulemaking*. Notes in the *Journal of Conflict Resolution* tend to follow a tired and uninspired script. The author identifies a specific deadlocked battle or recurrent struggle that is winding its way through the courts or the political process and announces: "the answer is alternative dispute resolution!" They may be right, but they knew the answer before they started writing and the contribution is usually rather modest. Avi did something different. His interest in governmental institutions and public policy led him away from the obvious path and to the much less well-traveled road of ADR and policymaking.

The Note argues that notice-and-comment rulemaking has failed in its democratic ambitions—despite the move on-line and lowering the barriers to public participation, we do not see *meaningful* participation by the general public (even, or perhaps especially, when form comments are submitted by the hundreds of thousands). It makes the counter-intuitive argument that effective public participation should be representative rather than direct, and that "reg neg" provides the necessary mechanism. Avi does a very nice job summarizing some current shortcomings with notice-and-comment rulemaking, including ineffective commenting and the tendency for critical decisions to be made *before* a proposed rule goes out for comment. It also summarizes the basic premises and mechanisms of negotiated rulemaking, which is now several decades old but really peaked in the 1990s and has been withering ever since. And then he makes the argument the second can ameliorate the first. Avi has read widely, he makes effective use of the existing literature, and the end result is creative without being far-fetched or untethered from reality. It is clear, accurate, and a real contribution.

Let me mention one other fact about Avi. It is not directly relevant to his legal abilities but is central to who he is. He is an observant Hassidic Jew, fluent in Hebrew and Yiddish, embedded in the Hassidic community. That community is in many ways isolated and self-contained; its members tend not to end up in the professions or with advanced degrees. Avi thus has feet in two vastly different worlds. That can sometimes be difficult, and exhausting, to navigate. But Avi pulls it off. He is emphatically *not* insular and insulated. He is quite self-consciously pursuing a career in the "outside" world. His current--and, I am confident, future—success is a testament to his brains, determination, and open-mindedness. And all this makes him an unusual and interesting person.

Between his first and second years of law school, Avi interned for Judge Reggie Walton of the U.S. District Court for the District Columbia. The experience will stand him in good stead as a full-time clerk, and he will hit the ground running. He very much wants to clerk, and for the right reasons: he is deeply interested in how courts operate, he hopes to be a litigator and realizes the experience will make him a better lawyer, and he sees it as a form of public service. I hope he has the opportunity.

I would be happy to provide any further information.

Michael Herz - herz@yu.edu - (646) 592-6444

Sincerely,

Michael Herz
Arthur Kaplan Professor of Law

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April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is my great pleasure to be asked to provide a letter of reference for Avraham Snider, one of the most talented and perspicuous of students that I have had the good fortune to teach over the last many years. I know Avraham well by virtue of having had him in my Contracts class during his first semester at the Law School and since then have kept in close contact. He was top of the class in the final exam and so he acted as a highly successful and much appreciated Teaching Assistant for the following year's class and even undertook subsequently to train the incoming Teaching Assistants to excellent effect. In short, I am very happy to recommend Avraham in the very strongest of terms as a superlative prospect for a clerkship.

A Hassidic Jew who came to the Law School while being father of 4 young children, Avraham had to cope with numerous familial pressures during his initial course of study. These were greatly exacerbated by COVID and lock down during which time, while maintaining an excellent GPA he was also having to work in a house in which his four children were having to attend school online from home. I mention this to indicate both his maturity of vision and capacity to navigate conflicting tasks and multiple demands, qualities that will stand him in good stead in a clerkship.

Avraham is ambitious intellectually and institutionally and is extremely focused on acquiring the skills and knowledge necessary as well as the networks necessary for an expansive and rewarding career in law. He has interned already in the Chambers of a District Court Judge in the District of Columbia and learned at close quarters both the skills he would need and the benefits that are to be gained in terms of mentoring and experience from a clerkship. He has, in other words, a strong sense of the social and communicational expertise that is needed for success and has already exhibited a significant talent for building such relationships and activating the knowledge of both procedure and substance that will provide invaluable assistance in the Chambers that he joins.

As adverted above, Avraham is first and foremost an excellent scholar, with a broad range of knowledge and a laser sharp ability to focus on the intricacies of subtle doctrinal and practical policy issues. It was for this reason that I appointed him to head the teaching assistants and orchestrate the support sessions, exam review and doctrinal sessions. The success of this program under his leadership is clear and compelling evidence of Avraham's commitment to building community and informational relationships as well as indicating an expansive capacity for communication across difference and diversity. An inspired tutor and most incisive scholar, combining expansiveness of vision with meticulous attention to detail, I find it hard adequately to express my enthusiastic support for his application and my conviction that he will add immeasurably to the Chambers that he joins.

Yours Truly,

Peter Goodrich
Professor and Director of the Program in Law and Humanities

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April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write on behalf of Avi Snider, a student of mine who is seeking a clerkship in your chambers. Avi is a talented student who would be an asset in your chambers.

Avi was a student in my Property class during the Covid-19 pandemic. Although the class was held entirely on Zoom, Avi managed to participate regularly in class discussions, and was clearly engaged with the course material despite the trying circumstances. I was not at all surprised when he wrote an A- exam in the course.

More recently, I have had occasion to read Avi's journal note, which argues that administrative agencies should use negotiated rulemaking more liberally than they do. The note is ambitious and well-written, and bodes well for Avi's potential to become an excellent law clerk.

Avi has accomplished a lot in law school, but for someone with his background, just making it to law school was a major accomplishment. Hasidic Jews have long disdained integration into the secular world, and have been especially slow to encourage the best and brightest among them to pursue careers in law. Avi overcame significant social pressure when he decided to enter law school. On top of that, the religious emphasis on family often leaves little room for the difficult regimen first-year law students face. Avi is pursuing his law degree at a time when he has four small children. His success in swimming against the tide says volumes about his potential as a lawyer.

Avi has participated in Cardozo's Prosecutor Practicum, which allows a small number of talented third-year students to spend a semester working full-time in the New York County D.A's office. The opportunity is consistent with Avi's long-term objective: serving as a litigator, perhaps on behalf of a government organization. In addition to preparing Avi for a career as a litigator, the Practicum has enabled him to further hone his litigation skills, which will serve his long-term career goals, but also make him more valuable as a law clerk.

In short, Avi Snider's legal talents make him an attractive addition to your chambers staff, and his diverse background provides an added bonus. I am happy to recommend him.

Stewart E. Sterk
H. Bert and Ruth Mack Professor of Real Estate Law

AVRAHAM (AVI) SNIDER

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As a legal intern at the U.S. Attorney's Office for the Southern District of New York, I wrote the attached draft brief in response to a *pro se* appeal in the U.S. Court of Appeals for the Second Circuit. The appeal was from the District Court's denial of a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).

All individual names have been changed. The Appellant's name was replaced with "John Doe" and the names of the coconspirators were replaced with generic pseudonyms. I have received my supervisor's permission to use this brief as a writing sample. This writing sample is my own work and has not been edited by anyone else.

Preliminary Statement

John Doe appeals from an order entered on July 28, 2022, in the United States District Court for the Southern District of New York, by the Honorable Richard J. Sullivan, United States Circuit Judge, sitting by designation, denying Doe's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A).

Doe is serving his sentence.

Statement of Facts

A. The Charges and Doe's Offense Conduct

Indictment 16 Cr. __ (RJS) (the "Indictment") which was filed on October 27, 2016, charging Doe and four others in three counts. Count One charged Doe and others with conspiracy to commit an armed robbery of individuals believed to be engaged in narcotics trafficking, in violation of 18 U.S.C. § 1951. Count Two charged Doe and others with conspiracy to distribute and possess with the intent to distribute 500 grams and more of cocaine, in violation of 18 U.S.C. §§ 846 and 841(b)(1)(B). Count Three charged Doe and others with possessing a firearm, and aiding and abetting the use, carrying, and possession of a firearm, during and in relation to the crimes charged in Counts One and Two, in violation of 18 U.S.C § 924(c)(1)(A)(i).

The defendant was part of a Yonkers-based group that in September 2016 agreed to commit an armed robbery of a drug dealer in the Bronx, who they believed was in possession of 2 kilograms of cocaine. (PSR ¶¶ 14-

34[1]). Joseph Adams initially recruited Doe and Kevin Jones, each of whom were members of a Yonkers-based streets crew and involved in drug dealing and gun possession, to participate in the robbery. (PSR ¶¶ 17, 20). At the time, Doe was on bail for committing an unrelated armed robbery of a different, rival drug dealer.[2] (PSR ¶ 19). Doe, in turn, recruited James Smith, his drug supplier, to provide a vehicle for the robbery, and agreed to split his anticipated personal share of the robbery proceeds (500 grams of cocaine) with Smith and to have Smith sell Doe's share of the drugs they obtained. (PSR ¶¶ 19, 24). Smith also had supplied guns to Doe, in the past, and they had also previously committed at least one robbery together.[3] (PSR ¶ 35). Smith recruited the last member of the conspiracy, his uncle, David Smith, who had a Chevrolet Suburban (the "Suburban"), to participate in the

[1] "PSR" or "Presentence Report" refers to the Presentence Investigation Report prepared by the United States Probation Office (the "Probation Office") in connection with Doe's sentencing, dated July 19, 2019; "Br." refers to Doe's *pro se* brief on appeal; "SA" refers to the supplemental appendix filed with this brief; "Dkt." refers to an entry on the District Court's docket for this case. Unless otherwise noted, citations omit all internal quotation marks, case citations, footnotes and alterations.

[2] In connection with that robbery, Doe possessed a fake gun and one of Doe's accomplices possessed a real gun and non-fatally shot the victim. (PSR ¶ 35).

[3] Doe used those guns to engage in shootings against a rival gang, and Doe would also, at times, supply those guns to young teenagers to engage in shootings at the rival gang. (PSR ¶ 35).

robbery and drive the robbers to the site of the anticipated robbery. (PSR ¶ 19).

On the afternoon of September 28, 2016, David Smith drove James Smith, Joseph Adams, and John Doe in the Suburban to pick-up Kevin Jones. After they picked up Jones, they picked up a firearm—a 9-millimeter Cobray semiautomatic handgun—from Jones' stash location. David Smith then drove the co-conspirators from Yonkers to Washington Heights to meet up with the cooperating witness ("CW-1"), as planned, and to discuss the planned robbery. (PSR ¶ 25). After arriving at the meet location, CW-1 entered the Suburban to discuss the robbery and how it would proceed. Specifically, they discussed that CW-1 was going to pretend to order 2 kilograms of cocaine on behalf of Adams and his crew from CW-1's drug supplier, who was the intended victim. They further agreed that after they met up with the intended victim, CW-1 would enter the victim's vehicle and inspect the quality of the drugs, while Adams and Jones approached the vehicle with a firearm and grabbed the drugs from the victim's car. (PSR ¶ 26).

After discussing the robbery in the vehicle, David Smith drove the Suburban to the planned location for the robbery–a parking lot at a Target Department store in the Bronx. (PSR ¶¶ 27-28). Upon entering the parking lot, David Smith became suspicious of the location and that someone might recognize him or his vehicle. David Smith stopped in several different locations in the lot before he parked the Suburban and CW-1 exited to meet the intended victim. (PSR ¶ 28). David Smith then became uncomfortable with the location and attempted to drive away as law enforcement officers converged on the vehicle to make arrests. (PSR ¶ 29). As law enforcement approached the Suburban, Jones threw the firearm out of

the window of the vehicle, and all the defendants were subsequently placed under arrest. (PSR ¶¶ 29-30).

B. Doe's Guilty Plea

On April 27, 2017, pursuant to a written plea agreement with the Government, Doe pled guilty before Magistrate Judge Kevin N. Fox to Counts One and Three of the Indictment, which charged a robbery conspiracy and possession of a firearm in furtherance of a crime of violence and a narcotics conspiracy, and the District Court subsequently accepted that guilty plea. (PSR ¶ 7). As part of the Plea Agreement, the Government agreed to dismiss Count Two, which carried a ten-year mandatory minimum.

C. Doe's Sentencing

On January 11, 2019, Doe appeared before Judge Sullivan for sentencing. Before imposing sentence, Judge Sullivan calculated the Guidelines range, based on the defendant being in the highest criminal history category, as 137 to 156 months' imprisonment. Reviewing the defendant's criminal history, Judge Sullivan noted that there was "a pattern of violence [] that is troubling" and "suggest that this is somebody who is kind of dangerous." (Sent. Tr. 38-39). Discussing the offense, Judge Sullivan recognized that "the facts of this crime are really troubling," because the offense was "really, really dangerous," and could have led to someone getting killed. (Sent. Tr. 61). After considering the defendant's youth and serious mental history, Judge Sullivan sentenced Doe to 60 months' imprisonment for Count One and 60 months' imprisonment for Count Three, resulting in a total term of

120 months' imprisonment. (Sent. Tr. 64, 65; *see also* Dkt. 215).

Doe is incarcerated at USP Allenwood and is scheduled to be released on April 6, 2025.

D. Motion for Companionate Release

On March 28, 2022, the District Court docketed a *pro se* motion from Doe requesting compassionate release. (Dkt. 293). Doe argued that he should be released based on his participation in rehabilitative and educational programs offered by the BOP. (Dtk. 293 at 3-6). He also claimed that he should be released based on the COVID-19 pandemic and medical conditions, such as breathing issues resulting from a 2013 stabbing and subsequent improper treatment, that increase his odds of becoming seriously ill with COVID-19. (Dkt. 293 at 7-10).

The Government opposed Doe's motion on two grounds. (Dkt. 296). First, the Government argued that Doe had failed to establish extraordinary and compelling reasons to reduce his sentence. (*Id.* at 5). Second, the Government argued that the Section 3553(a) sentencing factors weighed against a sentence reduction.

On July 28, 2022, Judge Sullivan denied Doe's compassionate release motion in a written opinion, holding that a "sentencing reduction is not warranted in light of the factors set forth in 18 U.S.C. § 3553(a)." (SA 78). Judge Sullivan described and commended Doe's efforts at rehabilitation, including obtaining his GED, completing other prison programs, and working in prison, but found that those positive steps were outweighed by other Section 3553(a) factors. (SA 80).

In assessing the Section 3553(a)(2)(c) factor, Judge Sullivan noted that Doe played an "active role in a conspiracy to commit robbery, in broad daylight, at a location where innocent bystanders could have been harmed or killed"; that Doe's conduct was "part of a dangerous and worrisome pattern of violence," and was committed while on bail for an unrelated armed robbery; and that Doe's "extensive criminal history also raises serious concerns about his risk of recidivism." (SA 81).

Judge Sullivan observed that Doe had already received a below-Guidelines sentence and that further reducing his sentence would lead to an unwarranted sentence disparity with Doe's coconspirator, James Smith, whom Judge Sullivan regarded as comparably culpable for their joint crime. (SA 81, 82).

Finally, Judge Sullivan found that Doe's medical conditions and potentially greater risk of COVID-19 did not warrant a sentence modification because Doe had not indicated any specific diagnosis pertaining to his breathing difficulties, the Certified Medical Assistant at USP Allenwood, where Doe is incarnated, stated that his breathing issues are "not an everyday occurrence," and Doe has access to adequate medical services at Allenwood (SA 82-83).

ARGUMENT

The District Court Did Not Abuse Its Discretion in Denying Doe's Motion for Compassionate Release

A. Applicable Law

"A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 824 (2010). One such circumstance, commonly referred to as the "compassionate release" provision, allows a court to "reduce [a] term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). Extraordinary and compelling reasons are therefore "necessary—but not sufficient—for a defendant to obtain relief under § 3582(c)(1)(A)." *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (*per curiam*). Even where extraordinary and compelling reasons exist, "the court must also consider 'the factors set forth in section 3553(a) to the extent that they are applicable' before it can reduce the defendant's sentence." *Id.* (quoting 18 U.S.C. § 3582(c)(1)(A)). For the same reason, a district court may deny a motion for compassionate release based solely on the Section 3553(a) factors, without deciding "whether the defendant has shown extraordinary and compelling reasons that might (in other circumstances) justify a sentence reduction." *United States v. Keitt*, 21 F.4th 67, 69 (2d Cir. 2021) (*per curiam*).

The Section 3553(a) factors include "the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from future crimes by the defendant; and the need to avoid unwarranted

sentencing disparities." *United States v. Roney*, 833 F. App'x 850, 852 (2d Cir. 2020) (citing 18 U.S.C. § 3553(a)).

This Court reviews the denial of a motion for a discretionary sentence reduction for abuse of discretion. *See*, *e.g.*, *Jones*, 17 F.4th at 374; *United States v. Saladino*, 7 F.4th 120, 122 (2d Cir. 2021); *United States v. Holloway*, 956 F.3d 660, 664 (2d Cir. 2020). "[A] district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions." *United States v. Halvon*, 26 F.4th 566, 569 (2d Cir. 2022).

A district court's denial of compassionate release based on the Section 3553(a) factors is entitled to "the same deference" as "a district court's imposition of sentence based on its determination of the § 3553(a) factors." *United States v. Seshan*, 850 F. App'x 800, 801 (2d Cir. 2021); *see also Roney*, 833 F. App'x at 853 (the defendant "'may disagree with how the district court balanced the § 3553(a) factors, but that is not a sufficient ground' for finding an abuse of discretion" (quoting *United States v. Chambliss*, 948 F.3d 691, 694 (5th Cir. 2020))); *accord Halvon*, 26 F.4th at 569. That deference recognizes that the district court " 'is in a superior position to find facts and judge their import under § 3553(a) in the individual case,' " and that "reversal is not justified where 'the appellate court might reasonably have concluded that a different sentence was appropriate.' " *Chambliss*, 948 F.3d at 693 (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)); *accord United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (this Court should not "substitute [its] own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case"). Rather than second-guess the weight a district court assigned to any

particular sentencing factor, this Court will review only "whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *Cavera*, 550 F.3d at 191. Furthermore, in reviewing a defendant's challenge to a sentencing court's Section 3553(a) analysis, this Court "will not assume a failure of consideration simply because a district court fails to enumerate or discuss each § 3553(a) factor individually." *United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008).

B. Discussion

The District Court correctly denied Doe's motion based on its assessment of the Section 3553(a) factors. In particular, Judge Sullivan found that release was not warranted given, among other factors, the need to protect the public from Doe's dangerous conduct, § 3553(a)(2)(C), and the need to avoid unwarranted sentence disparities, § 3553(a)(2)(A). (*See* SA 81-82). Because the District Court properly exercised its broad discretion in concluding that the Section 3553(a) factors weighed against Doe's release, its order denying his motion should be affirmed. *See Keitt*, 21 F.4th at 73 n.4 ("[A] district court may rely solely on the § 3553(a) factors when denying a defendant's motion for compassionate release.").

Doe claims that the District Court failed to take his education and rehabilitation efforts into account in weighing the Section 3553(a) factors. (Br. 10-11). Doe cites *Pepper v. United States*, 562 U.S. 476 (2011), for the proposition that "a court should sentence a defendant as he stands before the court today." (Br. 11). And that "at the original sentencing, the [C]ourt lacked proof of substantial good behavior and rehabilitation in prison for the entire

six-years of imprisonment." (Br. 12). On this basis, Doe argues that he "is a totally different person than he was 72 months ago," and thus the District Court abused its discretion by not deciding his motion "as if th[is] sentencing proceeding was his initial proceeding." (Br. 12).

Doe confuses the proceedings at issue and argues that Section 3582(c) entitles him to be resentenced with consideration of his education and rehabilitation efforts. Doe's reliance on *Pepper* is misplaced. *Pepper* concerned a defendant whose sentence was overturned on appeal. The Supreme Court held that on remand, the District Court was permitted to consider evidence of the defendant's postsentencing rehabilitation in determining a new sentence. *See Pepper v. United States*, 562 U.S. 476, 481 (2011) ("We hold that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines range.") Doe did not appeal his original sentence and it remains final.

On the contrary, this Court has held that "a compassionate-release motion is not an opportunity to second guess or to reconsider the sentencing court's original decision." *Roney*, 833 F. App'x at 854. Rather, Section 3582(c)(1)(A) allows the District Court to modify an otherwise final sentence where the District Judge finds that a modification is warranted. *See also Dillon v. United States*, 560 U.S. 817, 825 (2010) ("§ 3582(c)(2) does not authorize a sentencing or resentencing proceeding."); *United States v. Mock*, 612 F.3d 133, 137 (2d Cir. 2010) ("[B]ecause § 3582(c)(2) does not authorize a sentencing or resentencing proceeding, a defendant may not seek to attribute error to the original, otherwise-final sentence in

a motion under that provision."); *United States v. Moore*, 975 F.3d 84, 90 (2d Cir. 2020) (First Step Act motions, which are governed by 18 U.S.C. § 3582(c)(1)(B), do "not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing.").

In any event, Judge Sullivan *did* account for Doe's rehabilitation efforts and applauded him for them, but still found that those efforts did not prevail in the face of the other Section 3553(a) factors. Doe may disagree with how Judge Sullivan balanced the Section 3553(a) factors, but that disagreement "is not a sufficient ground for finding an abuse of discretion." *Halvon*, 26 F.4th at 569; *see also Roney*, 833 F. App'x at 853.

The relevant question is whether Judge Sullivan abused his discretion in denying Doe's motion. He did not. The Section 3553(a) factors Judge Sullivan relied on can easily "bear the weight" assigned to them "under the totality of circumstances in the case." *Cavera*, 550 F.3d at 191. As Judge Sullivan explained, Doe's active role in the armed robbery, deeply troubling lack of respect for the law, and extensive criminal history all weighed against his motion. Doe has identified no reason to second-guess Judge Sullivan's assessment of what length of sentence remained warranted under Section 3553(a).

CONCLUSION

The order of the District Court should be affirmed.

Dated: New York, New York
February 22, 2023

Respectfully submitted,

DAMIAN WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

Applicant Details

First Name	**Michael**
Last Name	**Snow**
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Contact Phone Number	**6463690922**

Applicant Education

BA/BS From	**State University of New York-Binghamton**
Date of BA/BS	**May 2014**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 5, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
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Dear Judge Matsumoto,

I am a recent graduate of Harvard Law School and I am writing to apply for a clerkship in your chambers beginning in 2025. This fall I will begin working for the New York City Law Department as the Corporation Counsel Honors Fellow.

I believe that my strong legal research and writing abilities and my commitment to public service make me a good fit for this important position. During my time in law school, I completed internships with the Appeals Division of the Office of the Massachusetts Attorney General, the U.S. Attorney's Office (SDNY), and the NYC Law Department. Each position involved substantial research and writing, including projects drafting memoranda for the City of New York that have influenced policies adopted by the New York City Department of Education. Prior to law school, I worked in New York State government and for civil rights not-for-profit organizations.

Included with my application are my resume, transcripts, writing sample and letters of recommendation from the following individuals:

- Chief Judge David Barron, United States Court of Appeals for the First Circuit, Amy_Paradis@ca1.uscourts.gov, (617) 748-4717
- Andrea Fastenberg, New York City Law Department, Legal Counsel Division, afastenb@law.nyc.gov, (212) 356-2496
- Julie McCormack, WilmerHale Legal Services Center of Harvard Law School, jmccorma@law.harvard.edu, (508) 320-1502

I welcome any available opportunity to speak further, and I thank you for your consideration.

Sincerely,

Michael Snow

Michael Snow

201 Eastern Parkway, Apt. 3G Brooklyn, NY 11238
Msnow@jd23.law.harvard.edu; (646) 369-0922

EDUCATION

Harvard Law School, J.D., May 2023
Honors: Writing Award for the Program on Biblical Law and Christian Legal Studies
Activities: Public Service Student Leaders Program
Jewish Law Students Association

Binghamton University, State University of New York, B.A., English, Philosophy, May 2014
Honors: Phi Beta Kappa, *summa cum laude*
Dean's List, Philosophy Department Honors

EXPERIENCE

New York City Law Department, Office of the Corporation Counsel, New York, NY
Corporation Counsel Honors Fellow 2023 - 2024
Honors Intern, *Legal Counsel Division* Summer 2022
Conducted research and wrote legal memoranda on the City's responsibilities regarding transportation for special education students, benefits for undocumented immigrants, and accessibility requirements under the ADA. Counseled City Hall and City agencies on legality of proposed policies and legislation.

Massachusetts Attorney General's Office, Boston, MA Fall 2022
Clinical Student Attorney, Appeals Division
Conduct legal research and writing on the use of digital evidence in criminal trials and support Assistant Attorneys General with investigations and legal filings. Prepare legal memos on recent decisions of the Massachusetts Supreme Judicial Court.

WilmerHale Legal Services Center of Harvard Law School, Boston, MA Spring 2022
Clinical Legal Intern, Safety Net Unit
Provided direct legal services to ten clients seeking disability benefits. Interviewed clients and medical experts, conducted legal research, drafted motions, and prepared clients for hearings and appeals.

U.S. Attorney's Office for the Southern District of New York, New York, NY Summer 2021
Legal Intern, Criminal Division
Researched and drafted legal memoranda on evidentiary issues for case involving money laundering and crypto-currency exploitation. Drafted briefs and request to charge for case involving corruption by judicial official.

New York State Governor's Office, Albany, NY and New York, NY 2018 – 2020
Director of Jewish Affairs
Oversaw relations between Executive Chamber and statewide Jewish communities. Advanced civil rights initiatives including a $25 million program to combat hate crimes and discrimination. Helped lead response to Covid-19 outbreak.

Anti-Defamation League (ADL), New York, NY 2017 – 2018
Assistant Director, New York Region
Managed response to over 50 reports of hate crimes and bias incidents per month. Liaised with and testified at hearings held by the U.S. Department of Justice, New York City Council, and NYPD.

Hillary for America, Dubuque, Iowa Summer – Fall 2016
Field Organizer
Recruited, trained, and managed 300 volunteers to mobilize voters. Organized and executed daily campaign events.

American Jewish Committee, Berlin, Germany 2015 – 2016
Fellow
Facilitated programs on refugee integration and fostering multicultural ties for policy makers and educators.

Fulbright U.S. Student Program, Berlin, Germany 2014 – 2015
English Teaching Assistant
Taught English and American civics to German high school students, grades 10-12, at Wald-Gymnasium.

PERSONAL

Conversant in Hebrew and German. Interested in crossword puzzles, vegetarian cooking, hiking, and backgammon.

Harvard Law School

Date of Issue: May 26, 2023
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Page 1 / 2

Record of: Michael E Snow
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023
Program on Biblical Law and Christian Legal Studies Writing Award: Judeo-Christian Legal Thought/The Intersection of Faith & Law
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 7 Greiner, D. James	P	4
1001	Contracts 7 Lessig, Lawrence	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	H	2
1003	Legislation and Regulation 7 Rakoff, Todd	H	4
1004	Property 7 Smith, Henry	P	4
	Fall 2020 Total Credits:		18

Winter 2021 Term: January 01 - January 22

1052	Lawyering for Justice in the United States Gregory, Michael	CR	2
	Winter 2021 Total Credits:		2

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 7 Minow, Martha	P	4
1002	Criminal Law 7 Gersen, Jeannie Suk	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	P	2
2237	The Role of the State Attorney General Tierney, James	H	2
1005	Torts 7 Lahav, Alexandra	H	4
	Spring 2021 Total Credits:		16
	Total 2020-2021 Credits:		36

Fall 2021 Term: September 01 - December 03

2460	Children and the Law Dailey, Anne	P	3
2035	Constitutional Law: First Amendment Fried, Charles	H	4
2079	Evidence Lvovsky, Anna	P	4
2398	Public Problems: Advice, Strategy, and Analysis Barron, David	H	2
	Fall 2021 Total Credits:		13

Winter 2022 Term: January 04 - January 21

2181	Local Government Law Anderson, Michelle	H	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

2048	Corporations Hanson, Jon	P	4
2068	Employment Discrimination Churchill, Steve	P	2
3131	Religious Institutions and the Religion Clauses Weinberger, Lael	CR	1
8039	Veterans Law and Disability Benefits Clinic Gwin, Elizabeth	H	3
2520	Veterans Law and Disability Benefits Clinical Seminar Gwin, Elizabeth	H	2
	Spring 2022 Total Credits:		12
	Total 2021-2022 Credits:		28

Fall 2022 Term: September 01 - December 31

8015	Government Lawyer: Attorney General Clinic Tierney, James	H	4
2156	Non-profit Organizations and Law Minow, Martha	H	2
2212	Public International Law Modirzadeh, Naz	P	4
3205	The Law and Politics of Boycotts Fried, Jesse	CR	1
	Fall 2022 Total Credits:		11

Winter 2023 Term: January 01 - January 31

2091	Food and Drug Law Hutt, Peter Barton	H	3
	Winter 2023 Total Credits:		3

Spring 2023 Term: February 01 - May 31

2000	Administrative Law Sunstein, Cass	P	3

continued on next page

Harvard Law School

Record of: Michael E Snow

Date of Issue: May 26, 2023
Not valid unless signed and sealed
Page 2 / 2

3082	Land Use Law Brady, Maureen	H	3
2169	Legal Profession: Public Interest Lawyering Wacks, Jamie	P	3
3168	The Crisis Facing Democracy Fontana, David	CR	1
	Spring 2023 Total Credits:		10
	Total 2022-2023 Credits:		24
	Total JD Program Credits:		88

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

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1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Harvard Law School

Date of Issue: January 20, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Michael E Snow
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 7 Greiner, D. James	P	4
1001	Contracts 7 Lessig, Lawrence	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	H	2
1003	Legislation and Regulation 7 Rakoff, Todd	H	4
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1002	Criminal Law 7 Gersen, Jeannie Suk	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	P	2
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Winter 2023 Total Credits: 3

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Assistant Dean and Registrar

Harvard Law School

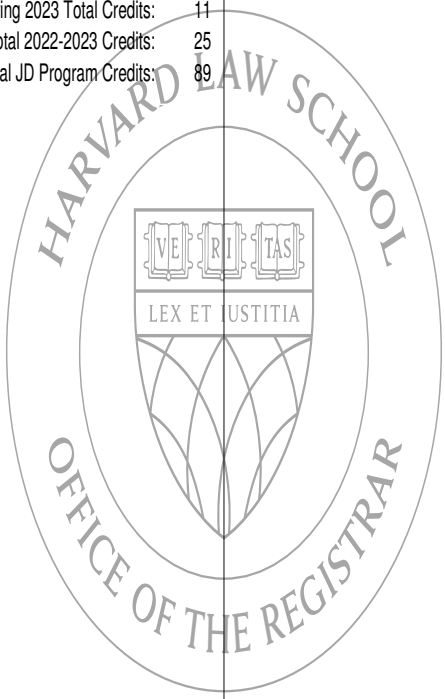
Record of: Michael E Snow

Date of Issue: January 20, 2023
Not valid unless signed and sealed

2028	Comparative Constitutional Law Khaitan, Tarunabh	~	2
3082	Land Use Law Brady, Maureen	~	3
2169	Legal Profession: Public Interest Lawyering Wacks, Jamie	~	3

Spring 2023 Total Credits: 11
Total 2022-2023 Credits: 25
Total JD Program Credits: 89

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
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Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
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Assistant Dean and Registrar

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is with great pleasure that I recommend Michael Snow for a clerkship in your chambers. Michael was a student in a seminar that I teach at Harvard Law School called "Public Problems." It is a course designed for students with policy backgrounds and who are studying law. The aim is to help them think analytically about legal advising on high-stakes problems. It requires the students to be legally sophisticated, but also to be practically minded and to account for the non-legal dimensions of problems in their role as legal advisor. Michael excelled in the course and received a top grade. He was a frequent, thoughtful, and intelligent participant. He was unusually open-minded in his thinking, often bringing the class discussion to a deeper level by his willingness to say something against the grain and by his evident willingness to consider his own views.

His habits of mind -- from my perspective -- are precisely those that a judge would want in a clerk. His final paper showed him to be a graceful and careful writer, but it also enabled one to see the big picture without sacrificing precision. These, too, of course, are critical traits for a law clerk to possess. Michael is also a delightful and mature person. His prior experience in state government has given him a healthy respect and skepticism all at once about how decisions are made in government. I recommend him to you both gladly and highly.

Sincerely,

David J. Barron

Chief Judge, United States Court Appeals for the First Circuit and Louis D. Brandeis Visiting Professor of Law, Harvard Law School

David Barron - judge_david_barron@ca1.uscourts.gov - 617-748-4717

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I had the pleasure of supervising Michael Snow during his spring 2022 semester working in the Safety Net Project of the Veterans Law and Disability Benefits Clinic at the Legal Services Center of Harvard Law School. As his supervisor and instructor, I saw firsthand Michael's excellent legal research and writing skills and know him to be deeply responsible, effective, capable, organized, independent, and thoughtful with a highly developed sense of ethical responsibility and personal follow-through. Having worked with students from Harvard Law School for over 28 years, I enthusiastically recommend Michael's selection as a Judicial Clerk. I have no doubt that he will serve your court with the utmost dedication and distinction.

During his semester under my supervision, Michael worked on several Social Security Disability Benefits cases. For these cases, he took the lead in organizing client contact, developing our arguments, writing briefs to submit to the Administrative Law Judges (ALJs), and conducting all aspects of the case in preparation for eventual hearing before an ALJ. He was diligent and thorough in putting together his arguments which often required sorting through hundreds of pages of medical records. His analysis in all of his cases was strong and on point, needing little to no direction to ascertain the appropriate strategies in each and demonstrating considerable skill in applying law to fact in laying out his arguments.

Michael has a knack for asking the right questions to identify and meet the underlying legal standard in the issues being discussed. He demonstrated tenacity and ingenuity in his legal research, and for one of his cases tracked down the SSA classification of U.S. military reserve duty service in the 1950's as well as the applicable case law. Michael is a gifted writer with a notable ability to present complex fact patterns with clarity and precision while retaining both his own voice and effectively conveying a sense of our client. His written work was exemplary; I could always be confident that assignments would be timely, well-written, organized, and well-supported by the relevant authorities. Michael was skilled in using purposeful organizational tools that made his briefs accessible and more easily understood both with respect to the law and to our position. He was also able to quickly and effectively incorporate feedback and adjust the tone of his writing as appropriate to the audience.

Michael is also a particularly strong oral communicator. He expressed himself clearly and engages others with respect and an open mind. Other students noted Michael's ability to translate a particularly complicated case into an organized narrative with clear arguments and counterarguments. He demonstrated similarly excellent instincts in his interactions with clients. These cases require us to ask what can seem like invasive and embarrassing questions about our clients' medical history, mental health, drug use, and financial situation. Our clients were uniformly low income, often older, many are veterans or others with traumatic histories, and several were immigrants, with English as a second language. Despite these differences in background, Michael connected with his clients and without exception put them at ease within his first communications with them. He demonstrated care in dealing with sensitive topics and earned the trust and cooperation of his clients. One case in particular stands out due to the diligence, sensitivity and compassion he demonstrated in working with an older client with possible memory issues.

In all of Michael's work, he was extremely responsible and maintained a keen awareness of professional and ethical standards. He was friendly and easy to work with and I appreciated the effort he made to use both day-to-day communication tools and thorough preparation for our weekly meetings to understand and advance his cases. This made it easy for him to identify any gaps in his own understanding or work-process and ask the right questions to solve the problem. Michael successfully managed a heavy caseload and demonstrated terrific systems for organizing his work, meeting deadlines and communicating the appropriate level of detail for supervision – this enabled him to work well under pressure on a variety of projects simultaneously. His maturity and self-sufficiency was evident in his ability to work independently, take initiative, and yet seek feedback as appropriate. He was intentional in getting to know me and the other clinical staff and students in spite of the challenges of hybrid learning and practice and proved adept at team work in the hybrid environment.

Michael's stellar transcript speaks to his academic success. Beyond the classroom, Michael has been conscientious and devoted to public service. He worked in demanding public service roles for several years between college and law school, and continues to act in response to the needs of others through volunteer work despite academic and other responsibilities. I was pleased but not surprised when I learned that we were both working to assist with the resettlement of Afghani refugees in the Boston area.

I unreservedly recommend Michael for this clerkship. He combines competence, diligence, effectiveness and insight with exceptional research, analytical and communication skills. I believe his maturity, perspective, and commitment to direct action set him apart – he took advantage of every opportunity to hone his litigation skills to better represent low-income veterans and individuals with disabilities. I consider him one of my most effective clinical interns and would hire him myself if I could. In every setting he finds himself, I know that he will continue to model excellent learning, keen ethical instincts and exceptional lawyering. I unequivocally urge his selection and if I can be of any further assistance or provide you with any further information, please do

Julie McCormack - jmccorma@law.harvard.edu

not hesitate to contact me.

Best regards,

Julie McCormack
Senior Clinical Instructor and Lecturer on Law
Director, Safety Net Project
jmccorma@law.harvard.edu
(508) 320 1502

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel

ANDREA FASTENBERG
afastenb@law.nyc.gov
(212) 356-2496

September 12, 2022

Dear Judge:

I am writing to recommend Michael Snow for a judicial clerkship.

I am a Senior Counsel in the Legal Counsel Division of the New York City Law Department, and have worked in Legal Counsel for 21 years. Michael worked in Legal Counsel as a Summer Honors Intern during the summer of 2022. During this period, I had the pleasure of working with Michael as the coordinator of assignments for our summer interns and as his supervisor on a challenging question of statutory interpretation. Michael brought sharp research and analytical abilities and superlative communication skills to each of the projects on which he worked. Michael also distinguished himself in the interest he demonstrated in the issues the Law Department faces as counsel to the mayor and in the way in which he managed competing demands and deadlines. Michael is a mature and thoughtful young man whose calm and straightforward approach to his work ensured that he completed each assignment in a timely and responsible way.

While working in Legal Counsel, Michael worked on three significant research and writing assignments. First, Michael analyzed whether local legislation that imposes requirements on school buses used to transport children with disabilities permitted the Department of Education ("DOE") to make certain changes to the way the DOE organizes the transportation of children to school. Second, Michael researched whether the City has a duty under the Americans with Disabilities Act or the Telecommunications Act to require that films it acquires for broadcast on public television be close-captioned. Third, Michael analyzed whether section 1621 of title 8 of the United States Code, which makes various categories of aliens, including undocumented immigrants, ineligible for many state and local public benefits, violates the Tenth Amendment of the United States Constitution. Through this inquiry, Michael learned about the federal government's authority over immigration, the anti-commandeering doctrine, and federal preemption.

My direct knowledge of Michael's research, analytical, and writing skills stems from his work on the first assignment. To answer the question posed by the DOE, Michael researched the legislative history of three provisions of the City's Administrative Code, which

included a nearly 500-page bill jacket, considered the extent to which the Individuals with Disabilities Act (IDEA) preempted the provisions in question, and wrote a ten-page memorandum detailing his analysis. The assignment was a difficult one for a law student as it required, in addition to familiarity with the local legislative process, federal rulemaking, and caselaw interpreting the IDEA, application of statutory canons of constructions so as to harmonize the IDEA with requirements imposed by local law 20 years prior to enactment of the IDEA.

Michael's work on this project was excellent. Michael's close review of the bill jacket identified an early draft of the legislation that was critical in shaping our understanding of the City Council's legislative intent. After thoroughly researching each issue that required consideration and discussing the approach with myself and other attorneys in Legal Counsel, Michael developed a thoughtful analysis of the relationship between the IDEA and the local legislation. Michael's analysis reflected a very serious engagement with the underlying goals and purpose of the IDEA. Michael worked through multiple drafts of his memorandum and responded to feedback with alacrity. In addition, Michael's communications with the attorneys from the DOE were outstanding. Michael possesses a unique ability to seek information and convey guidance. On each occasion in which we discussed the underlying issue with the attorneys at DOE, I was struck by the effectiveness of Michael's ability to ask clarifying questions, explain our reasoning, and transmit guidance. The questions he posed and reasoning he provided always demonstrated sound judgment. In sum, Michael's written analysis not only provides a comprehensive background of the Administrative Code provisions and the IDEA but also proffers a very compelling perspective through which the DOE can give robust meaning to each statutory scheme. The memorandum that Michael developed will be a valuable resource for the DOE and for the Law Department.

Finally, it is very important to note that, on a personal level, Michael is a pleasure to work with. He is a kind, considerate, and eminently responsible person, and has a wonderfully warm and personable disposition. I would be very happy to have the opportunity to work with Michael again.

For all of these reasons, I strongly recommend Michael Snow for a judicial clerkship. I am confident that Michael would be an asset to the work of your office.

If you have any questions about my work with Michael Snow, please feel free to contact me for more information.

Thank you for your consideration.

Sincerely yours,

Andrea Fastenberg

Andrea Fastenberg

Michael Snow
345 Washington Street, Somerville, MA 02143
Msnow@jd23.law.harvard.edu; (646) 369-0922

Writing Sample 2 Cover Page

The attached is an excerpt from a memorandum I wrote while interning with the Legal Counsel Division of the New York City Law Department during the summer of 2022. The memo contains attorney-client privileged information that I obtained permission to use for the purposes of this application.

The memo analyzes whether 8 U.S.C. § 1621, a federal statute that generally bars certain aliens, including undocumented immigrants, from state and local public benefits, violates the Tenth Amendment of the United States Constitution. While my supervisor offered high level feedback during the drafting process, the memo's organization, research, and writing is primarily my own.

ATTORNEY-CLIENT: PRIVILEGED & CONFIDENTIAL

MEMORANDUM

TO: [redacted] Legal Counsel

FROM: Michael Snow, Legal Intern

DATE: August 5, 2022

RE: Analysis of 8 U.S.C. § 1621 under the Tenth Amendment

I. Question Presented

Does 8 U.S.C. § 1621, a federal statute that generally bars certain aliens, including undocumented immigrants, from state and local public benefits, violate the Tenth Amendment of the United States Constitution?

II. Short Answer

There is a possible argument that 8 U.S.C. § 1621 violates the Tenth Amendment's anti-commandeering rule by dictating how state and local governments should administer their own public benefits, but such an argument likely faces significant headwind. Because courts have repeatedly acknowledged that the federal government has broad power to regulate immigration, § 1621 could be upheld on federal preemption grounds.

III. Discussion

Section A explains the anti-commandeering rule of the Tenth Amendment by discussing the U.S. Supreme Court's three major decisions in this area. Section B analyzes the constitutionality of 8 U.S.C. § 1621 in light of these cases and the federal government's broad

authority regarding immigration by considering the most likely arguments for and against the statute's constitutionality.

A. Overview of the Supreme Court's Tenth Amendment Case Law

…

B. Analysis of Whether 8 U.S.C. § 1621 is Constitutional

8 U.S.C. § 1621 generally disqualifies aliens from state and local public benefits. Congress enacted § 1621 as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Congress passed PRWORA to reform the country's welfare and disability benefits system, which Congress believed had become bloated and fostered dependency. *See* H.R. Comm. on Ways and Means, 104th Cong., 2nd Sess., Summary of Welfare Reforms Made by Public Law 104-193 (Comm. Print 1996).[1]

Section 1621 has four subsections. Subsection (a) provides that unless an alien falls within three specific categories, they are ineligible for any "State or local public benefit." Undocumented immigrants are among those rendered ineligible for benefits under subsection (a). Subsection (b) provides exceptions for various benefits that aliens disqualified under subsection (a) may still receive, including emergency medical care and emergency disaster relief. Subsection (c) lists the state and local public benefits that aliens disqualified under subsection (a) are not eligible for. These benefits include professional licenses and many classic social welfare benefits, such as "welfare, health, disability, public or assisted housing, … food assistance, [and] unemployment" benefits. Subsection (d) provides that states may make "illegal aliens," *i.e.*, undocumented immigrants, eligible for state and local benefits "only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." *Id.*

[1] https://www.govinfo.gov/content/pkg/CPRT-104WPRT27305/html/CPRT-104WPRT27305.htm

The City could argue that § 1621 violates the Tenth Amendment because like the statutes held unconstitutional in *Murphy, Printz,* and *New York,* § 1621 impermissibly compels states to "govern according to Congress' instructions." *New York*, 505 U.S. at 162. The City could point out that statute undermines state sovereignty in two ways.

First, subsection (a) of the statute prohibits states from exercising authority in their own domain: how to spend their own funding on communities within their borders. In *Murphy*, the Supreme Court held that PASPA, which prohibited states from authorizing sports gambling, violated the anti-commandeering rule because it "unequivocally dictate[d] what a state legislature may and may not do." 138 S. Ct. at 1478. Section 1621(a), the City could argue, similarly dictates what a state legislature may or may not do by prohibiting states from authorizing certain immigrants to receive state-funded benefits. Just as PASPA exceeded Congress's authority to issue orders to the states, subsection (a) violates the "basic principle" of the Tenth Amendment—"that Congress cannot issue direct orders to state legislatures"—because it compels states to enforce a federal regulatory program. *Id*.

Second, subsection (d) of the statute also interferes with how states exercise their own authority by dictating the terms and conditions by which states can make state-funded benefits available to the aliens prohibited by the statute from having them. Specifically, subsection (d) provides that states wishing to make such aliens eligible for state-funded benefits must enact a law after August 1996 that "affirmatively provides" for their eligibility. These specific requirements condition the exercise of state authority as if "federal officers were installed in state [governments] and were armed with the authority to stop [state officials] from [pursuing] any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id.* at 1478. Administrative, political, or financial considerations may lead a state to confer, by other means, the authority to determine public benefits eligibility on its own agencies or political

subdivisions. Section 1621 prohibits states from doing so even though "having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi,* 456 U.S. 742, 761 (1982).

In short, the City could argue that section 1621 is unconstitutional because it essentially prohibits states from making certain aliens like undocumented immigrants eligible for public benefits unless they do so in the way Congress has prescribed. Under this argument, by presenting states with the appearance of a meaningful choice, § 1621 is like the provisions of the Low-Level Radioactive Waste Policy Amendments Act held unconstitutional in *New York*. There, the Court held that Congress could not require states to either manage the disposal of low-level radioactive waste or take ownership of and be liable for all damages that the waste might cause. *New York*, 505 U.S. at 153. Because Congress did not have independent authority to require states to implement either of the two alternatives, Congress could not compel states to choose between the two. *Id.* at 176. The City would argue that § 1621 similarly restricts states to choosing between "two unconstitutionally coercive regulatory techniques" because Congress has no authority to unilaterally decide the eligibility criteria of state-funded public benefits or to dictate how states can make certain communities eligible for those benefits. *Id*. Thus, although the mechanism provided by § 1621(d) may appear to mitigate the statute's overall commandeering effect, the false choice nevertheless constitutes a similarly unconstitutional commandeering.

To support this Tenth Amendment argument, the City should cite *Matter of Vargas*, 131 A.D.3d 4 (2d Dep't 2015), the only case known to address § 1621's constitutionality directly.[2]

[2] At the Second Department's invitation, both the New York Attorney General and U.S. Department of Justice filed amicus briefs discussing the constitutionality of § 1621. New York argued that the statute, if read to prohibit the undocumented immigrant's admission to the bar, would violate the Tenth Amendment. The United States argued that the statute was constitutional.

There, the Appellate Division, Second Department, held that § 1621(d) unconstitutionally restricted New York's ability to allocate power among its coequal branches of government as it saw fit. *Id.* at 27. The *Vargas* court considered whether § 1621 prevented an undocumented immigrant, who was authorized to be in the country under the federal Deferred Action for Childhood Arrivals program, from receiving a law license. The court held that the statute's enactment requirement in subsection (d) interfered with New York's right to structure its governmental decision-making because the state had delegated to the judiciary the authority to determine eligibility for admission to the bar under Judiciary Law § 53(1). *Id*. at 24. The Tenth Amendment, the court explained, prevented Congress from mandating "the governmental mechanism by which the state may exercise its discretion to opt out of the restrictions imposed by section 1621(a)." *Id.* at 27.

"While giving all deference to the federal government's supreme authority to regulate immigration and to determine immigration policy," the *Vargas* court explained that the "mere fact that the state government decision here involves undocumented immigrants … does not and cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its authority to determine which coequal branch of government should exercise the power of the sovereign where the federal legislation has left to the states the ultimate policy determination whether to extend public benefits to such undocumented immigrants." *Id*. at 27-28. Section 1621(d) was therefore "constitutionally infirm," "as it applies to the question of the admission of attorneys and counselors-at-law to the practice of law in the State of New York." *Id*.

Relying on *Vargas,* the City could argue that § 1621(d) similarly unconstitutionally restricts how states and localities determine eligibility for their own public benefits to a Congressionally prescribed mechanism that undermines New York's ability to allocate its

authority and decision-making. While *Vargas* specifically addressed the issuance of law licenses, the court's reasoning and concerns about federal commandeering would apply with equal force to the City's authority to administer the broad range of public benefits proscribed by § 1621(c).

The federal government, however, would almost certainly argue that 8 U.S.C. § 1621 comports with the Tenth Amendment.[3] To start, the federal government would stress that Congress passed PRWORA to expressly set "national policy" concerning not only "welfare," but also "immigration," 8 U.S.C. § 1601, an area where Congress enjoys broad power. The Constitution explicitly confers on Congress the power to "establish an uniform Rule of Naturalization." U.S. CONST. art. 1, § 8, cl. 4. What's more, Congress's authority to control immigration, known as the plenary power doctrine, is exclusive. The Supreme Court has stated that the "authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." *Takahashi v. Fish & Game Com*., 334 U.S. 410, 416 (1948); *see also Arizona v. United States*, 567 U.S. 387, 394 (2012) (explaining that the federal government has "broad, undoubted power over the subject of immigration and the status of aliens"). At the same time, the Court has also held that Congress's power over immigration essentially concerns "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

To the federal government, § 1621 is a legitimate exercise of Congress's plenary authority to regulate immigration. As the Ninth Circuit has explained, "Congress determined that immigrant self-sufficiency was an element of U.S. immigration policy and that there was a compelling national interest in assuring both 'that aliens be self-reliant' and that the availability

[3] We can anticipate the federal government's arguments because in addition to filing an amicus brief in *Vargas*, the Department of Justice filed an intervenor brief arguing for the statute's constitutionality in *Bauer v. Elrich*, 8 F.4th 291 (4th Cir. 2021), a case challenging a county's Covid-19 relief program under 8 U.S.C. § 1621. The Fourth Circuit ultimately resolved *Bauer* on an issue of standing without addressing whether § 1621 was constitutional.

of public benefits does not serve as an 'incentive for illegal immigration.'" *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014) (quoting 8 U.S.C. § 1601(5)-(6)). In the federal government's view, § 1621 primarily regulates immigrants or immigration and thus does not violate the Tenth Amendment because states have no authority to regulate immigration.

Moreover, the federal government would contend that § 1621 in one sense empowers states. Rather than infringing on a state's right to "remain independent and autonomous within their proper sphere of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997), Congress, through § 1621(d), accorded the states an additional measure of respect by allowing them to make eligibility determinations regarding public benefits within an established federal framework. From this perspective, the enactment requirement in § 1621(d) does not interfere with a state's ability to allocate authority among its political branches or subdivisions – it provides states with a degree of autonomy and discretion in an area where they are due none.

The federal government would also assert that § 1621 differs from the laws held unconstitutional in *New York*, *Printz*, and *Murphy* because § 1621 concerns immigration, an exclusive federal domain, and does not directly compel a state to do (or refrain from doing) anything. In *New York*, Congress had issued ultimatums to the states to dispose of low-level radioactive waste or assume liability for any damages and, in *Printz,* Congress required local officials to conduct background checks on prospective gun buyers. Section 1621, in contrast, issues no such requirements to states or localities. And § 1621 differs from the law in *Murphy* because the statute does not prohibit the use of a state power that would otherwise be one that states could exercise. Instead, § 1621 establishes a federal default that undocumented immigrants are ineligible to receive state or local public benefits and preserves a procedure for states to deviate from this baseline.

To the federal government, § 1621 is more like the laws upheld in *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), neither of which compelled the states at all. In *Hodel*, the federal surface mining statute merely "*allowed* but did not *require* the States to implement a federal program." *Murphy*, 138 S. Ct. at 1479. In *FERC*, the federal statute, enacted to restrain the oil and natural gas consumption, simply directed state utility regulatory commissions "to consider, but not necessarily to adopt" federal regulatory standards. *Id.*

The federal government would also insist that *Matter of Vargas* was incorrectly decided, but that even if the Second Department correctly applied Tenth Amendment jurisprudence, the case is limited to its facts. After all, the Second Department itself make clear only a narrow issue had been resolved: whether, to the "limited extent" that § 1621 governs the admission of attorneys as professional licensees, New York courts could "opt out" of the restrictions imposed by § 1621 because the courts already had the express statutory authority to admit new attorneys, a power recognized as distinctly judicial in every state. *Id.* at 9, 28. Additionally, the Second Department remarked that withholding a license to practice law from an undocumented immigrant ran counter to PRWORA's goals of fostering self-reliance. *Id*. This reasoning does not support, the federal government might argue, providing states and localities greater authority to administer welfare benefits to undocumented immigrants.

…

Applicant Details

First Name	**Jon**
Last Name	**Spilletti**
Citizenship Status	**U. S. Citizen**
Email Address	**jcs9904@nyu.edu**
Address	**Address** **Street** **54 Elizabeth Street, Apt. 38** **City** **New York** **State/Territory** **New York** **Zip** **10013** **Country** **United States**
Contact Phone Number	**9083919901**

Applicant Education

BA/BS From	**Rutgers University-New Brunswick/ Piscataway**
Date of BA/BS	**May 2019**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Fromer, Jeanne
jeanne.fromer@nyu.edu
(212) 998-6129
Kahan, Marcel
marcel.kahan@nyu.edu
_212_ 998-6268
Miller, Arthur
arthur.r.miller@nyu.edu
212-992-8147

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jon Spilletti
54 Elizabeth Street, Apt. 38
New York, NY 10013

May 1, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to express my strong interest in a clerkship in your chambers for the 2025 term. I am a third-year student at New York University School of Law, where I am a *Robert McKay Scholar* and serve as a Notes Editor for the *New York University Law Review*. Following my graduation in May 2023, I will work as a litigation associate at Kirkland & Ellis LLP. In a previous term I had the distinct pleasure of interning for the Honorable Brian R. Martinotti of the United States District Court for the District of New Jersey. I believe my experience working in the collegial environment of Judge Martinotti's chambers makes me a strong candidate for a clerkship in your chambers.

Enclosed in my application are the following materials: my resume, law school transcript, undergraduate transcript, writing sample, and recommendation letters. My writing sample is a paper, *Impersonal Jurisdiction: Introducing a "Materially Identical" Standard to the Class Action*, written for the Class Actions Seminar taught by the Honorable Jed S. Rakoff.

Writing recommendation letters on my behalf are Professor Arthur R. Miller, with whom I took Civil Procedure and Complex Litigation and for whom I served as a research assistant and teaching assistant in Civil Procedure, and who is available at (212) 992-8147; Professor Jeanne Fromer, with whom I took Copyright and Advanced Copyright and for whom I served as a research assistant, and who is available at (212) 998-6129; and Professor Marcel Kahan, with whom I took Corporations and for whom I served as a teaching assistant in Corporations, and who is available at (212) 998-6268.

Thank you for your consideration. Please do not hesitate to contact me with questions about my application or candidacy. I am available at (908) 391-9901 or jcs9904@nyu.edu.

Respectfully,
/s/
Jon Spilletti

JON SPILLETTI
54 Elizabeth Street, Apt. 38
New York, NY 10013
(908) 391-9901
jcs9904@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2023
Unofficial GPA: 3.72
Honors: *Robert McKay Scholar — top 25% of class after four semesters*
New York University Law Review, Notes Editor
Dean's Scholar — *partial tuition scholarship based on academic merit*
Activities: Civil Procedure (Professor Arthur R. Miller), Teaching Assistant
Corporations (Professor Marcel Kahan), Teaching Assistant
First Generation Professionals, Treasurer

RUTGERS UNIVERSITY, New Brunswick, NJ
B.A. in Political Science and in Journalism, *summa cum laude*, May 2019
Cumulative GPA: 3.98
Honors: Matthew Leydt Society — *top 2% of graduating class*
Phi Beta Kappa
Dean's List (eight semesters)
Activities: *The Daily Targum*, Editor
Colleges Against Cancer, Public Relations Chair

EXPERIENCE

KIRKLAND & ELLIS LLP, New York, NY
Summer Associate, May 2022 — July 2022
Provided research support and drafted memoranda in complex commercial litigation matters, including securities, intellectual property, white-collar, and insurance litigation.

PROFESSOR JEANNE FROMER, New York, NY
Research Assistant, January 2022 — May 2022
Researched journal articles and books and drafted internal memoranda based on research to support Professor Fromer's upcoming article on trade secrecy.

PROFESSOR ARTHUR R. MILLER, New York, NY
Research Assistant, June 2021 — August 2021
Managed the revision and supplementation of Volume 14AA (Amount in Controversy) of Wright & Miller's Federal Practice and Procedure treatise. Revised Civil Procedure Hornbook (6th Edition) for upcoming publication.

HON. BRIAN R. MARTINOTTI, U.S. DISTRICT COURT OF NEW JERSEY, Newark, NJ
Judicial Intern, June 2021 — August 2021
Completed substantive writing assignments — including orders and memoranda — for supervisory review. Conducted legal research, providing support for chambers proceedings and opinions.

ADDITIONAL INFORMATION

Volunteered with Relay For Life at the county and collegiate level throughout high school and college. Enjoy reading fantasy novels, writing fiction, long-distance running, and singing.

Name: **Jonathan C Spilletti**
Print Date: **02/01/2023**
Student ID: **N10983154**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Jonathan F Harris			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Erin Murphy			
Torts	LAW-LW 11275	4.0	B+
Instructor: Barry E Adler			
Procedure	LAW-LW 11650	5.0	A
CR/F grade option allowed due to extenuating circumstances: original professor's health issue required a series of alternating class sessions by professor and two other professors.			
Instructor: Arthur R Miller			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Race and the Warren Court - Ho			
Instructor: Martin Guggenheim			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	B+
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Jonathan F Harris			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Liam B Murphy			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Martin Guggenheim			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A
Instructor: Marcel Kahan			
Copyright Law	LAW-LW 11552	4.0	A
Instructor: Jeanne C Fromer			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Arthur R Miller			
Class Actions Seminar	LAW-LW 12721	2.0	A
Instructor: Jed S Rakoff			
Class Actions Seminar: Writing Credit	LAW-LW 12727	1.0	A
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff			
Arthur R Miller			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Advanced Copyright	LAW-LW 11617	2.0	A+
Instructor: Benjamin E Marks			
Jeanne C Fromer			
Statutory Interpretation Seminar	LAW-LW 12252	2.0	A
Instructor: Jonah B Gelbach			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	56.0	56.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2022

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A-
Instructor: Andrew Weissmann			
Alternative Dispute Resolution	LAW-LW 11368	3.0	A
Instructor: Rebecca Price			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Marcel Kahan			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Kenji Yoshino			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	69.0	69.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Art Law	LAW-LW 10122	4.0	***
Instructor: Amy M Adler			
Innovation Policy Colloquium	LAW-LW 10930	3.0	***
Instructor: Jeanne C Fromer			
Christopher Jon Sprigman			
Law Review	LAW-LW 11187	2.0	***
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	***
Instructor: Trisha Michelle Rich			
Federal Courts and the Federal System	LAW-LW 11722	4.0	***
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	15.0	0.0
Cumulative	84.0	69.0

Staff Editor - Law Review 2021-2022

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective Fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

Updated: 10/4/2021

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

***Pomeroy Scholar**:*	Top ten students in the class after two semesters
***Butler Scholar**:*	Top ten students in the class after four semesters
***Florence Allen Scholar**:*	Top 10% of the class after four semesters
***Robert McKay Scholar**:*	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

JEANNE FROMER
Professor of Law

NYU School of Law
40 Washington Square South, 310C
New York, New York 10012
P: 212 998 6129
F: 212 995 4407
jeanne.fromer@nyu.edu

June 7, 2022

RE: Jonathan Spilletti

Dear Judge:

I am writing to recommend Jon Spilletti for a clerkship in your chambers with my absolute highest enthusiasm. Since I became a law professor fifteen years ago, Jon has been among the handful of best students with whom I have had the pleasure of working. His academic accomplishments, superb writing, passion for and dedication to the law, maturity, insightful and strong analytical skills, go-getter spirit, thoughtfulness, and modest, kind, and enthusiastic demeanor all indicate to me that a decision to hire Jon for a clerkship is loaded with high reward but very low risk.

I principally came to know Jon this past year (his 2L year) at NYU School of Law. Jon took my Copyright Law course this fall and my Advanced Copyright seminar this spring. Both classes are structured very differently, yet Jon shone in both of them. In Copyright Law, which is a traditional Socratic law school class, Jon was always prepared to answer any question I asked—be it doctrinal, theoretical, or philosophical—and he always added something unique to the class, be it an insightful analysis of a case or a well-defended viewpoint that others had not conceived. He turned in one of the top exams in my class, for which I awarded them an A.

Advanced Copyright is structured more as a seminar where we read cases and scholarly papers delving much deeper into the most pressing and ongoing copyright issues (such as appropriation art, copyright preemption, and music licensing). Jon has been a very engaged participant in a heavily active class. He has deep facility with the substantive areas we are discussing and has had a special interest in copyright issues that intersect with civil procedure and administrative law. For the class, Jon wrote a truly terrific and insightful paper on the Appointments Clause issues (highlighted by the U.S. Supreme Court's recent decision in *United States v. Arthrex, Inc.*) for the Copyright Claims Officers on the recently created Copyright Claims Board. Not only is Jon's paper timely and important, but he took an extraordinarily complex topic and cut through the complexity with clear (and accurate) writing and analysis (perhaps not surprising for someone who double majored in journalism and political science as an undergraduate at Rutgers). As a result of his paper and class performance, Jon earned the only A+ in a very talented class.

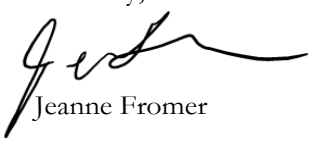
Jon has also been one of the best research assistants I've yet had. He's been doing research for me this year on a project on trade secret law, which has been a growing area of intellectual property. This project lies at the intersection of law, psychology, sociology, and ethics, and involves an understanding of "secrecy" more broadly to think through the aims of

trade secret law. As a result, Jon had to dig in not only to legal sources, but also writings in psychology, sociology, and philosophy. Even though the latter sources might have felt more esoteric, Jon was able to parse through them as easily as the legal sources. In each source, he located the most important and relevant contributions on the role of secrecy and highlighted them for me crisply and clearly in written memos as well as in-person meetings.

Jon has been equally impressive in his other law school pursuits. He is a Notes Editor for the *NYU Law Review*, has served as a Teaching Assistant for Arthur Miller in his Civil Procedure course and as a research assistant for him as well, is Treasurer of the First Generation Professional organization at NYU Law, and is a member of the Intellectual Property & Entertainment Law Society. He also served as a judicial intern last summer for Judge Brian Martinotti of the U.S. District Court for the District of New Jersey, Jon's beloved home state. Jon is working this summer at Kirkland & Ellis in litigation with an eye toward a career as a litigator.

All in all, I cannot recommend Jon highly enough for you. I think he would make a wonderful addition to your chambers, what with his sharp analytical abilities, academic excellence, terrific writing skills, passionate approach to the law, and nice and modest demeanor. He has my highest recommendation. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



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Marcel Kahan
George T. Lowy Professor of Law

June 13, 2022

RE: Jon Spilletti, NYU Law '23

Your Honor:

I am writing to recommend Jon Spilletti for a clerkship with you.

I know Jon from the Corporations class he took with me in the fall of 2021. Even though it was a large class, with over 80 students, Jon stood out. He made regular and significant contributions that enriched the class discussion. His comments were thoughtful and insightful, showed a high level of analytical skill, and evidenced a quick grasp of legal doctrine. When grading the exams, I was not surprised that Jon's was one of the best. He received a grade of A, one of the few students in the course to do so.

I have had multiple conversations with Jon outside of class. Jon is mature and engaging, takes initiative, and has good judgment. He is one of the students who make teaching stimulating and highly enjoyable.

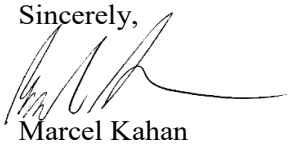
Jon also has strong writing skills. He earned his B.A. with a joint concentration in journalism and political science and served as an editor for his college daily newspaper. Jon's final paper in the Class Action Seminar, on personal jurisdiction in the class action context, is excellent. It is well written, clearly organized, carefully argued, and presents original and interesting ideas.

After the end of each fall semester, I ask some students whether they would like to become teaching assistants for my Corporations class in the following year. I base this decision not only on a student's exam and class participation, but also on my general impression of a student's diligence, attention to detail, interpersonal skills, and effectiveness as a teacher. Jon was one of the students to whom I offered the position. Luckily, Jon accepted and he will serve as my TA next fall.

In sum, I believe that Jon would make an outstanding clerk and I recommend him highly and without reservation.

If I can do anything else to be of assistance, please feel free to call or write me.

Sincerely,



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Arthur R. Miller
University Professor

June 13, 2022

RE: Jon Spilletti, NYU Law '23

Your Honor:

I am writing on behalf of Jon Spilletti, who is applying for a position as your clerk a year or two after his graduation from the New York University School of Law in the Spring of 2023. Based on Mr. Spilletti's excellent first-year classroom and examination performance, I invited him to be one of my part time research assistants for the summer following his first year. The remainder of the time was spent as a judicial intern for the Honorable Judge Brian R. Marinotti in the district court of New Jersey. He also was a member of the Complex Litigation course I teach with Professor Issacharoff this past Spring and a very effective teaching assistant for my civil procedure course in the fall of his second year.

As a research assistant Mr. Spilletti edited and updated certain portions of the annual supplementation of sections related to the amount in controversy requirement in the multivolume Wright and Miller Federal Practice and Procedure treatise. In addition he helped update and edit sections of the Civil Procedure hornbook I coauthor focusing on the chapters related to the amount and controversy material. This was part of an effort to produce a new edition of the book, which has now been published. In the course of these projects, Mr. Spilletti did a considerable amount of research, editing, and writing on the subjects assigned to him, much of which required the exercise of a great deal of thought, writing ability, legal analysis and judgment on his part. He is an extremely hard worker; indeed his work product equaled that of several of my full-time researchers.

Jon's research and writing was extensive and uniformly excellent. His work product was complete and sound, demonstrating considerable mental capacity, a very good command of research techniques, writing ability, and organizational skills. He also was able to master several aspects of federal civil procedure and subject matter jurisdiction, some of which were quite complex. He writes clearly and logically with an excellent sense of structure and idea sequence.

Jon is extremely bright, thoughtful, analytically sound, and takes instruction and direction well. He stood out in a very, very strong group of research assistants that summer. He also is constantly aware of the importance of professional improvement – he wants to

learn and develop his legal skills. Mr. Spilletti is a very helpful person by nature. He is conscientious and volunteered several times during our work together to assist other researchers get things done so that we could meet publishing deadlines for the annual supplementation of the treatise and revision of the hornbook. Jon’s work always was done in timely fashion, with great care and acute attention to detail. Indeed, one of his strengths is that attention to detail, which he exhibited in editing the manuscript for the revision of the hornbook. He understood fully the professional character and utility of his work. He is curious about issues, both legal and non-legal. I consider Jon to have been an extremely reliable, loyal, and dedicated research assistant. I rank him very, very highly among the summer researchers I have worked with in each of my more than sixty years of law teaching and employing multiple law students every summer.

Mr. Spilletti has a solid commitment to the law as a profession. I have no doubt about his seriousness in terms of long-term career development. I am certain he will do well with his law firm experience at Kirkland & Ellis in New York this summer following his second year of law school. Jon is an extremely likable, cheerful, and good-natured individual; he has a most pleasant personality and is a good conversationalist. I thoroughly enjoy his company, even though most of it was virtual during his first year. He is mature, broad gauged in his outlook, fields of interest, and is very much interested in the future of the legal profession and the world around him.

On the basis of my experience with him, Jon should fit in extremely well in the collegial environment of a judge’s chambers. He worked effectively and bonded with the other researchers the summer he spent with me and is well-liked by his classmates. The same should be true with regard to working with you and your other clerks and staff. I recommend him to you with great confidence that he can perform whatever tasks you ask of him. This is a very talented young man as evidenced by his superb academic performance at NYU. He deserves your most serious consideration.

If I can be of any further assistance to you with regard to Jon, please do not hesitate to communicate with me.

Sincerely,

Arthur R. Miller

WRITING SAMPLE

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The enclosed writing sample is a paper written for the Class Actions Seminar, taught by the Honorable Jed S. Rakoff. Titled *Impersonal Jurisdiction: Introducing a "Materially Identical" Standard to the Class Action*, it responds to the U.S. Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California* and analyzes the benefits and drawbacks of applying that case's contraction of personal jurisdiction to class action litigation. In doing so, the paper assesses several recent decisions in which various U.S. courts of appeals have addressed this question, exploring how application of the *Bristol-Myers Squibb* doctrine to class litigation would affect the satisfaction of personal jurisdiction over the defendants in those cases.

For case analysis that evaluates the doctrinal intersection of personal jurisdiction and class action litigation and studies the attendant impact of *Bristol-Myers Squibb*, see pages 6–15. For case analysis that applies the *Bristol-Myers Squibb* holding and the paper's proposed jurisdictional rule to the facts of recent appellate decisions, see pages 24–28. For analysis of the constitutional and policy implications of importing *Bristol-Myers Squibb* into class action doctrine, see pages 28–33.

This paper has not been edited by third parties; all contributions are my own. As noted in my cover letter, upon further revision and communication with my professors, I plan to convert the paper into a Note for the *New York University Law Review*.

Jon Spilletti
Writing Sample

IMPERSONAL JURISDICTION: INTRODUCING A "MATERIALLY IDENTICAL" STANDARD TO THE CLASS ACTION

JON SPILLETTI

Jon Spilletti
Writing Sample

INTRODUCTION

Justice Sonia Sotomayor, in dissent against the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California,* issued a premonition: "The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States."[1] Fearful of a narrowing specific jurisdiction concomitant with the ongoing contraction of general jurisdiction,[2] Sotomayor worried of a pattern of personal jurisdiction jurisprudence favoring federalism over fairness.[3] But because the plaintiffs in *Bristol-Myers Squibb* aggregated their claims in a mass action, the Court did not address whether its rule—that plaintiffs suffering the same injuries by the same defendant in different states were unlikely to be able to join together under an exercise of specific jurisdiction—would apply to class actions.[4] That question remains unanswered. In January 2021, the Court denied a petition for writ of certiorari regarding a Seventh Circuit decision that had cautioned against an extension of *Bristol-Myers Squibb* to the class action.[5] In declining to resolve an issue that has split the courts since the *Bristol-Myers Squibb* decision, the Court has failed to assuage Sotomayor's concerns, even if not wholly substantiating them.

Animating Sotomayor's dissent in *Bristol-Myers Squibb* was a longstanding and well-supported fear that the Court had upset the familiar balance between federalism and fairness in personal jurisdiction jurisprudence.[6] Sotomayor found that these traditional conceptions of

[1] 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting).
[2] *Id.* (citing Daimler AG v. Bauman, 571 U.S. 117 (2014)).
[3] *Id.* at 1788 ("The majority's animating concern, in the end, appears to be federalism . . . . But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct.").
[4] *Id.* at 1789 n.4 ("The Court today does not confront the question whether its opinion here would apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.").
[5] Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021).
[6] *Bristol-Myers Squibb*, 137 S. Ct. at 1788.

personal jurisdiction were distorted by aggregate litigation, as the corporate defendant has only a limited capacity for geographic inconvenience.[7] Without consideration of and accommodation for "the often competing interests of personal jurisdiction and aggregation," the Court's unaffected understanding of fairness and federalism grants corporate defendants a boon in the form of "disaggregation"; as personal jurisdiction doctrine treats aggregate litigation in like manner with other forms of litigation, it stands unattached from the interests of aggregate litigation, thereby benefitting those whose interests generally run counter: the corporate defendant.[8] Although Sotomayor's concerns about tipping the scale toward federalism are warranted by recent Court decisions,[9] interests in state sovereignty are not inconsistent with an expansion of personal jurisdiction, particularly in the class action context. If greater attention given toward state sovereignty as a limitation on the exercise of personal jurisdiction necessarily means less concern over the defendant's liberty interests, then there is less room for the Court to mold doctrine around a notion of fairness that conflates corporate and individual defendants.[10] Applied to the class action—a litigation device often used to hold accountable parties that "engage[] in a nationwide course of conduct"[11] resulting in injury to people irrespective of state boundaries—a "sovereign-

[7] *Id.* at 1784 ("A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjective a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.").
[8] Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 20 (2018). *See Bristol-Myers Squibb*, 137 S. Ct. at 1784. Although defendants do benefit from class adjudication through the consolidation of claims, a curtailment of the class action's scope will limit the defendant's risk of liability.
[9] *See Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("[E]ven if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 880, 885 (2011) (plurality decision) (finding that personal jurisdiction requires a "sovereign-by-sovereign" analysis that rejects "freeform notions of fundamental fairness" and recognizes that "each State has a sovereignty that is not subject to unlawful intrusion by other States").
[10] *See* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, IND. L.J. 597, 598 (1987) ("If . . . state sovereignty places some limits on the reach of state courts . . . then more scrupulous attention must be paid to the relationship between the state creating the court and the individual whose rights will be affected by the court, in class action cases as in others.").
[11] *Bristol-Myers Squibb*, 137 S. Ct. at 1784.

by-sovereign" assessment of personal jurisdiction would in fact support a broader exercise of specific jurisdiction.[12]

But without the Court definitively ruling on the unresolved question left from *Bristol-Myers Squibb*, and given the direction of personal jurisdiction and class action jurisprudence in recent years, it remains unlikely that the Court will support the expansion of personal jurisdiction in the class action context, at least relative to individual litigation. Therefore, to accommodate the interests of both personal jurisdiction and aggregate litigation, Federal Rule of Civil Procedure 4(k)(1) (Rule 4(k)(1)) should be amended to incorporate a framework informally furthered by Sotomayor in her *Bristol-Myers Squibb* dissent.

This Paper argues that Rule 4(k)(1) should be amended to allow for personal jurisdiction over defendants in claims under Rule 23 where the defendant has engaged in "conduct materially identical to acts"[13] taken by the defendant in the forum state. This formalized rule for personal jurisdiction in federal class actions would complement and inform the Rule 23(a) requirements for class certification, reconcile the "competing interests of personal jurisdiction and aggregation[,]"[14] and be consistent with the Court's understanding of personal jurisdiction as a means by which fairness and federalism may be protected. The Paper will proceed in three parts. Part I will review the contraction of personal jurisdiction and evaluate its application in class action litigation through cases decided since *Bristol-Myers Squibb*. Part II will explore attempts by scholars to resolve issues at the intersection of personal jurisdiction and class litigation. Part III will propose an amendment to Rule 4(k)(1) that broadens the exercise of specific jurisdiction for actions under

[12] *Nicastro*, 564 U.S. at 885.
[13] *Bristol-Myers Squibb*, 137 S. Ct. at 1786.
[14] Dodson, *supra* note 8.

Rule 23, apply this framework to recent class action litigation, and affirm its constitutional, doctrinal, and policy foundations.

I

PERSONAL JURISDICTION AND THE CLASS ACTION: AN UNCERTAIN MARRIAGE

A. Personal Jurisdiction in Individual Litigation

Personal jurisdiction concerns the power of the court to preside over a defendant's judgment.[15] It can be realized through either specific or general jurisdiction; the former is established when the cause of action arises out of or relates to the defendant's contacts with the forum state, while the latter does not require any connection to the underlying controversy but rather subjects a defendant to jurisdiction regardless of whether the cause of action arises out of or relates to the defendant's contacts with the forum state.[16] Under each branch of personal jurisdiction, specific and general, the Court has gradually curbed the power of the courts to bind the nonresident defendant to judgment.

1. Specific Jurisdiction

Before the Court decided *International Shoe Co. v. Washington* in 1945,[17] territoriality had been the touchstone of personal jurisdiction doctrine, per *Pennoyer v. Neff*, which dictated that "the laws of one State have no operation outside of its territory . . . no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."[18] In *International Shoe*, the Court accounted for increased mobility and industrialization to formulate an expansion of personal jurisdiction rooted in the Due Process

[15] *See* Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 4 (1982) (describing personal jurisdiction as a "concept of power").
[16] *See* 4A C. WRIGHT, A. MILLER & A. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1067.5 (4th ed. 2021) [hereinafter WRIGHT & MILLER].
[17] 326 U.S. 310 (1945).
[18] 95 U.S. 714, 722 (1877) (Field, J.).

Clauses of the Fifth and Fourteenth Amendments.[19] To subject defendants not physically present in the forum to suit, due process requires "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[20]

The constitutional requirements of minimum contacts, fair play, and substantial justice have manifested in a two-step approach requiring the establishment of minimum contacts with the forum state and the assertion of personal jurisdiction in a reasonable manner comporting with fair play and substantial justice.[21] For minimum contacts to be established, there must be purposeful availment by the defendant of the benefits and protections of the forum state's laws,[22] meaning the defendant's relationship with the forum state must be voluntary and foreseeable.[23] Because specific jurisdiction requires the plaintiffs' claims to arise out of or relate to the defendant's relationship to the forum, "there must be an affiliation between the forum and the underlying controversy."[24]

To exercise jurisdiction in a manner reasonable and consistent with fair play and substantial justice, the burden on the defendant is a primary concern to be supplemented by consideration of several factors: (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in securing convenient and effective relief; (3) the interstate judicial system's interest in obtaining the most efficient resolution; and (4) the shared interest of the states in the furtherance of

[19] *See* 4A WRIGHT & MILLER, *supra* note 16, § 1067.
[20] *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
[21] *See* 4A WRIGHT & MILLER, *supra* note 16, § 1067.2.
[22] Hanson v. Denckla, 357 U.S. 235, 253 (1958).
[23] *See* Kuan Chen v. United States Sports Acad., Inc., 956 F.3d 45, 59 (1st Cir. 2020) ("[T]he two cornerstones of purposeful availment are voluntariness and foreseeability. Achieving voluntariness demands that the defendant's contacts with the forum result proximately from its own actions. And to clear the foreseeability hurdle, the defendant's conduct and connection with the forum State must be such that he should reasonably anticipate being hauled into court there.") (citations and internal quotation marks omitted).
[24] Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1781 (2017) (Alito, J.); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021).

substantive social policy.[25] Although these factors articulated by the Court serve to establish the reasonableness of binding a non-present, nonresident defendant to judgment, they have been inconsistently applied.[26] As referenced in this Paper's Introduction, personal jurisdiction case law abides by two restraints: the defendant's individual liberty interests and state sovereignty.[27] In *World-Wide Volkswagen v. Woodson*, the Court identified these limitations on the exercise of specific jurisdiction: "The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States . . . do not reach out beyond the limits imposed on them . . . ."[28] In the years since *International Shoe* and its direct progeny, these functions have traded favor in the Court. Only two years after Justice Byron White articulated the two guiding principles of personal jurisdiction in *World-Wide Volkswagen*, he asserted that the personal jurisdiction requirement is sourced solely from the Due Process Clause such that it only protects individual liberty, not state sovereignty, interests.[29]

Despite this affirmative adoption of the individual liberty theory of personal jurisdiction, the Court in recent cases has favored a perspective largely informed by considerations of state sovereignty and interstate federalism. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court avowed that personal jurisdiction is a question of authority, rather than fairness.[30] The *Bristol-Myers Squibb* Court reinforced the *Nicastro* emphasis on federalism by stating that restrictions on

[25] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985); Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., 480 U.S. 102, 113 (1987).
[26] *See infra* notes 30–31 and accompanying text.
[27] *See* Wood, *supra* note 10.
[28] 444 U.S. at 291–92.
[29] Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").
[30] 564 U.S. 873, 883 (2011) (plurality decision).

personal jurisdiction are a consequence of the geographic limitations on state power.[31] The predominance of state sovereignty over individual liberty as the touchstone of personal jurisdiction has even led one district court to explicitly reconsider the relevance of fairness and individual liberty as an element of the jurisdictional inquiry.[32] Although the Court has employed state sovereignty and interstate federalism as means by which it can restrict the exercise of specific jurisdiction in individual litigation,[33] this Paper will demonstrate in Part III how the sovereignty theory of personal jurisdiction actually supports an expansion of personal jurisdiction in class action litigation.

2. General Jurisdiction

General jurisdiction steps in to support an exercise of personal jurisdiction where specific jurisdiction cannot: when the claim does not arise out of or relate to the defendant's contacts with the forum state.[34] Beyond this division of duties, general jurisdiction may be distinguished from specific jurisdiction in its requirement that the defendant's contacts with the forum state be "so continuous and systematic as to render [it] essentially at home," which paradigmatically will be the state in which an individual is domiciled and a corporation has its place of incorporation or principal place of business.[35] For corporate defendants, continuous and systematic contacts alone are not sufficient to exercise general jurisdiction in the forum state; rather, upon appraisal of the

[31] 137 S. Ct. 1773, 1780 (2017) ("[A]t times, this federalism interest may be decisive."); *see also* Dodson, *supra* note 8, at 28 n.170 (discussing how the *Bristol-Myers Squibb* Court ignored the reasonableness factors despite the facts suggesting their relevance).
[32] Kidston v. Res. Plan. Corp., 2011 WL 6115293, *3 (D.S.C. 2011) ("After *McIntyre*, the relevance of fairness as part of the jurisdictional inquiry is unclear.").
[33] *Supra* notes 30–31 and accompanying text.
[34] 4A WRIGHT & MILLER, *supra* note 16, § 1067.5.
[35] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); *see* Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988).

defendant's contacts nationwide, the contacts with the forum state must be sufficiently substantial as to consider the defendant at home.[36]

Just as the narrowing of specific jurisdiction has been consistent with the recession of the relevance of reasonableness in the jurisdictional inquiry, the contraction of general jurisdiction through its heightened contacts requirement obviates the need to assess fairness.[37] This consistent disregard of the individual liberty theory of personal jurisdiction in individual litigation—in both the specific and general domains—pairs well with the need to rescue class action doctrine from a perspective of personal jurisdiction that misunderstands the role and purpose of aggregate litigation.

B. Personal Jurisdiction in Class Action Litigation

Although class litigation raises novel considerations with respect to the assessment of personal jurisdiction, these issues have seldom reached the Court. Without affirmative binding rulings attached to the issues merited by class litigation, the class action remains governed by standard principles of personal jurisdiction imported from an incompatible individual litigation context. The class action poses three distinct issues: personal jurisdiction over defendants in defendant class actions,[38] personal jurisdiction over absent plaintiff class members,[39] and personal jurisdiction over defendants in nationwide class actions.[40]

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[36] Daimler AG v. Bauman, 571 U.S. 117, 138, 139 n.20 (2014) (stating that because a "[a] corporation that operates in many places can scarcely be deemed at home in all of them[,]" it would be inappropriate for general jurisdiction to be exercised wherever a corporation "engages in a substantial, continuous, and systematic course of business").
[37] *Id.* at 139 (noting the irrelevance of a multifactor reasonableness inquiry given an exercise of general jurisdiction requires a corporation to be "at home"). *But see id.* at 144 (Sotomayor, J., concurring) (finding, despite extensive contacts sufficient to otherwise establish general jurisdiction, that it would be unreasonable for the court to exercise jurisdiction over a case involving foreign plaintiffs suing a foreign defendant based on foreign conduct).
[38] For a discussion of issues of personal jurisdiction for defendants in defendant class actions, see Wood, *supra* note 10, at 607–12.
[39] *See id.* at 618–23.
[40] *See id.* at 612–18.

1. Personal Jurisdiction over Absent Plaintiff Class Members

Of the three personal jurisdiction issues unique to class litigation, the Court has only provided a definitive rule for absent plaintiff class members. In doing so, it distinguished plaintiffs in class litigation from those in individual litigation in recognition of the former's absentee status precluding express consent to the choice of forum.[41] In *Phillips Petroleum Co. v. Shutts*, the Court held that a forum need not have personal jurisdiction over absent plaintiff class members in actions brought under Rule 23(b)(3), as their rights to due process are sufficiently protected by the provision of notice, the opportunity to be heard, the right to opt out, and the requirement of adequate representation for class certification.[42] Therefore, a lack of minimum contacts with the forum state does not preclude personal jurisdiction over nonresident class members, given the sufficient due process protections for Rule 23(b)(3) classes.[43]

Informing the Court's permissive jurisdictional inquiry for absent plaintiff class members was its review of the burdens levied on plaintiffs in class litigation as compared to those of defendants. The absent plaintiff class member is welcome to "sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection," while the nonresident defendant must hire counsel, travel to the forum to defend against possible judgment, participate in discovery, and comply with the remedies charged by the court.[44] Through

[41] *See* Dodson, *supra* note 8, at 19 (describing how plaintiffs in individual litigation usually consent to adjudication in a forum by filing in that forum, as distinct from unnamed class members, whose party status is unclear).
[42] 472 U.S. 797, 811–12 (1985) (discussing the "minimal procedural due process protection" required for a forum state to bind an absent plaintiff in actions for money damages). The Court limited its ruling to class actions brought under Rule 23(b)(3). *Id.* at 811 n.3. Even so, some courts have extended *Shutts* to apply to Rule 23 classes consisting of a res or fund, such as 23(b)(1) limited fund classes, despite the lack of opt-out rights. *See, e.g.*, Juris v. Inamed Corp., 685 F.3d 1294, 1331–33 (2012) (discussing cases and concluding that a court with jurisdiction over a fund has jurisdiction over all claims against said fund, resolving personal jurisdiction objections); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:28 (5th ed. 2021) [hereinafter RUBENSTEIN].
[43] FED. R. CIV. P. 23(b)(3).
[44] *Shutts*, 472 U.S. at 808–11 ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.").

consideration of the relative burdens placed on absent plaintiffs and defendants in plaintiff class suits, the Court drew a disciplined distinction in the treatment of the two groups, obviating a formal personal jurisdiction analysis for the former.

2. Personal Jurisdiction over Defendants in Plaintiff Class Action Suits

As for the latter, the court's authority to assert personal jurisdiction remains unaffected by an exercise of class, rather than individual, litigation.[45] Therefore, for specific jurisdiction to be appropriate over the nonresident, nonconsenting defendant in a class action suit, there must be sufficient minimum contacts with the forum so as not to offend "traditional notions of fair play and substantial justice."[46] Whereas the Court in *Shutts* attempted to reconcile personal jurisdiction's need for fairness in adjudication with the realities of class litigation by balancing the relative burdens of the parties, this resolution is incomplete without consideration of and accommodation for the interests of class litigation as compared to individual litigation with respect to the defendant. Given the uncertainty regarding *Bristol-Myers Squibb*'s application to the class action, the principles guiding personal jurisdiction over the defendant in a nationwide plaintiff class action remain unclear.

The *Bristol-Myers Squibb* Court concluded that California could not exercise specific jurisdiction to adjudicate claims brought by non-Californians because they "were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California," meaning their claims did not arise out of or relate to the defendant's contacts with California.[47] *Bristol-Myers Squibb* envisions identical treatment for

[45] *See* 2 RUBENSTEIN, *supra* note 42, § 6:26.
[46] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
[47] Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1781 (2017) (rejecting personal jurisdiction over the claims of nonresidents while affirming personal jurisdiction over the claims of residents against the defendant because their claims arose out of or related to the defendant's relationship to the forum).

defendants irrespective of the mode of litigation—aggregate or individual—generating concerns over the viability of the nationwide class action.[48] These worries may be tempered by the *Ford Motor Co. v. Montana Eighth Judicial District Court* decision, in which the Court alluded to the "arise out of or relate to" phrase as a disjunctive with either condition independently sufficient to exercise specific jurisdiction,[49] perhaps suggesting that the *Bristol-Myers Squibb* Court misapplied its own standard in ignoring the relationship between the defendant's substantial purposeful contacts with the state and the non-residents' claims.[50] This argument however rests on shaky foundation; the Court itself explicitly rejected specific jurisdiction as a basis for personal jurisdiction.[51] There likewise exists no tenable argument for an application of general jurisdiction to salvage the nationwide class action; the gradual tapering of general jurisdiction has effectively limited its exercise only to those fora in which the defendant is domiciled.[52]

Without the court issuing a conclusive answer as to the application of *Bristol-Myers Squibb* to the class action, those doctrinal attempts to save the nationwide class action are purely theoretical, as there is not yet a doctrine from which the nationwide class action must be saved. In the interim, the lower courts have been forced to grapple with the uncertainty emanating from *Bristol-Myers Squibb*, and their responses have largely divided into three courses. Most courts[53]

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[48] *See supra* note 1 and accompanying text.
[49] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026, 1028 (2021) (finding specific jurisdiction given "Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States," producing a "strong relationship among the defendant, the forum, and the litigation").
[50] *See* 2 RUBENSTEIN, *supra* note 42, § 6:26.
[51] *Bristol-Myers Squibb*, 137 S. Ct. at 1782 ("[T]he California courts cannot claim specific jurisdiction.").
[52] *Compare* Daimler AG v. Bauman, 571 U.S. 117, 139 n.19 (2014) (leaving open the possibility for an "exceptional case" of general jurisdiction beyond the paradigmatic fora), *with* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (framing an "exceptional case" narrowly by finding relocation of business activities due to war was emblematic) (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).
[53] *See, e.g.*, 2 RUBENSTEIN, *supra* note 42, § 6:26; Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J. F. 205, 207 (2019) (finding that "a substantial majority of district courts" have left personal jurisdiction inquiries unaffected by *Bristol-Myers Squibb*); Gregory J. Casas, Alan W. Hersh, Blakeley S. Oranburg, *The Perpetuation of Class-Action Forum Shopping? Federal Circuits Address Whether Courts Need Personal Jurisdiction to Hear Nationwide Class Actions*, NAT'L L. REV. (June 25, 2020),

considering the issue have opted against subjecting the claims of every absent plaintiff class member to a separate jurisdictional inquiry, distinguishing *Bristol-Myers Squibb* as a mass action,[54] finding the *Bristol-Myers Squibb* focus on federalism to be inapposite to class litigation,[55] and favoring an approach to personal jurisdiction that focuses on the claims of the named plaintiffs.[56] The Seventh and Sixth Circuits have led the campaign in refusing to extend *Bristol-Myers Squibb* to the class action, defining absent class members as non-parties for purposes of personal jurisdiction.[57] Other courts have favored application of *Bristol-Myers Squibb* to the class action, limiting the capacity for a nationwide class action to persist outside of those fora in which a defendant is subject to general jurisdiction.[58] These decisions have held that courts cannot avail themselves of specific jurisdiction over absent plaintiff class members whose claims do not arise out of or relate to the defendant's contacts with the chosen forum. The D.C. and Fifth Circuits have

https://www.natlawreview.com/article/perpetuation-class-action-forum-shopping-federal-circuits-address-whether-courts.

[54] *See, e.g.*, Gonzalez v. Costco Wholesale Corp., 2018 WL 4783962, *7 (E.D.N.Y. 2018); Gress v. Freedom Mortg. Corp., 386 F. Supp. 3d 455, 465 (M.D. Pa. 2019); Morgan v. U.S. Xpress, Inc., 2018 WL 3580775, *5 (W.D. Va. 2018); Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab'y Products, Inc., 2018 WL 1377608, *5 (E.D. La. 2018); Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 819 (N.D. Ill. 2018); Harrison v. Gen. Motors Co., 2018 WL 6706697, *7 (W.D. Mo. 2018); Lacy v. Comcast Cable Commc'ns, LLC, 2020 WL 1469621, *2 (W.D. Wash. 2020); Murphy v. Aaron's, Inc., 2020 WL 2079188, *15–16 (D. Colo. 2020); Feldman v. BRP US, Inc., 2018 WL 8300534, *5 (S.D. Fla. 2018).

[55] *See, e.g.*, *In re* Chinese-Manufactured Drywall Products Liab. Litig., 2017 WL 5971622, *17–19 (E.D. La. 2017) ("*BMS* would require plaintiffs to file fifty separate class actions in fifty or more separate district courts across the United States—in clear violation of congressional efforts at efficiency in the federal courts.").

[56] *See, e.g.*, Cabrera v. Bayer Healthcare, LLC, 2019 WL 1146828, *8 (C.D. Cal. 2019) (holding *Bristol-Myers Squibb* application to class actions inappropriate given Rule 23's due process safeguards); Allen v. ConAgra Foods, Inc., 2018 WL 6460451, *7 (N.D. Cal. 2018) (same); Dennis v. IDT Corp., 343 F. Supp. 3d 1363, 1366 (N.D. Ga. 2018).

[57] Mussat v. IQVIA, Inc., 953 F.3d 441, 447 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021) ("Nonnamed class members . . . may be parties for some purposes and not for others.") (quoting Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002)); Lyngaas v. Ag., 992 F.3d 412, 433 (6th Cir. 2021) (following "long-standing precedent" in exercising personal jurisdiction over nonresident defendants in nationwide class actions).

[58] *See, e.g.*, DeBernardis v. NBTY, Inc., 2018 WL 461228, *2 (N.D. Ill. 2018) ("[I]t is more likely than not based on the Supreme Court's comments about federalism that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions . . . ."); Carpenter v PetSmart, Inc., 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020); Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850 (N.D. Ohio 2018) (extending *Bristol-Myers Squibb* to FLSA claims).

charted a third path in avoiding explicit application or rejection of the *Bristol-Myers Squibb* rule by requiring class certification before disposition of the personal jurisdiction inquiry.[59]

Although most courts confronting the issue have decided against application of *Bristol-Myers Squibb* to the class action, the federal judiciary's treatment of the issue remains fractured. Lack of binding precedent leaves some nationwide class actions vulnerable to fissures across state lines and others secure in their viability, depending on the forum. In recognition of the dangers of a class action device in which the policies of deterrence, fairness, and efficiency can only be realized according to the chosen forum, procedural scholars have sought a personal jurisdiction doctrine responsive to the needs of class litigation. These frameworks for deconstructing personal jurisdiction carry the spirit of *Shutts* in acknowledging the unique constitutional, doctrinal, and policy positioning of class litigation.

II

A Review of Academic Literature on Personal Jurisdiction and Class Actions

Recognition of the unnatural application of traditional personal jurisdiction principles to the class action did not originate with the discourse following *Bristol-Myers Squibb*. As evidenced by *Shutts*, a case decided thirty-two years before *Bristol-Myers Squibb*, the Court has confronted the intersection of personal jurisdiction and class litigation with an understanding that disharmony between "competing interests" cannot be solved in a one-size-fits-all manner.[60] In ruling that formal personal jurisdiction analyses need not be conducted for a forum to hold adjudicatory authority over the claims of absent plaintiff class members, the Court crafted a rule founded on the

[59] Molock v. Whole Foods Mkt. Grp., 952 F.3d 293, 298 (D.C. Cir. 2020) ("Putative class members become parties to an action—and thus subject to dismissal—only after class certification."); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020).
[60] Dodson, *supra* note 8.

differences between defendants and unnamed plaintiffs in class litigation.[61] Procedural scholars studying personal jurisdiction and the class action have understood—in like mind with the *Shutts* Court—that where interests and policies do not align, uniformity precludes value. Professors Diane P. Wood,[62] Scott Dodson, and Robert Haskell Abrams[63] present frameworks for reconciling the incongruence of interests between personal jurisdiction and class litigation as related to defendants in plaintiff class actions. Their proposals, ranging from modest to system-shifting, attempt to answer the questions left unresolved by the Court in the years following *Shutts* and *Bristol-Myers Squibb*, advocating for a doctrine that embraces the diversity in defendants.

A. Professor Wood: Hinge Specific Jurisdiction on the Class Representatives' Claims

Prompted by the Court's 1985 decision in *Shutts*, Professor Wood addressed the class action court's unsettled authority to resolve the claims of absent plaintiff class members.[64] Offering a theory of personal jurisdiction rooted in the representational model of class litigation and in the independent status afforded to class actions for jurisdictional purposes, Professor Wood proposed that only the named representatives need satisfy the specific jurisdiction requirement.[65] The representational model of class actions holds the class action to be independent from other forms of litigation, upholding the qualified representative as protective of absentee interests.[66] By contrast, the joinder perspective of class litigation would not support this proposal, as this approach "requires each individual member of the class, representative or absentee, to satisfy all substantive

[61] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985).
[62] Professor Wood currently serves as Chief Judge of the United States Court of Appeals for the Seventh Circuit. Given that she wrote the article cited before her appointment to the federal judiciary, this Paper will refer to her as Professor Wood for the sake of clarity.
[63] Professor Abrams's article extends beyond the application of personal jurisdiction principles in class litigation, but it will be discussed in terms of the class action for comparative purposes, with reference to its intended broader application when appropriate.
[64] Wood, *supra* note 10, at 597.
[65] *Id.* at 599.
[66] *Id.*

and procedural prerequisites for litigating in a given forum."[67] Therefore, under the joinder model, the claims of absent plaintiff class members endure the same jurisdictional inquiries as the claims of named representatives.

Professor Wood asserts that a representational approach is informed by and responsive to the cohesiveness of classes, the policy against piecemeal litigation, and the theory of public law litigation.[68] These three qualities converge to support a theory of personal jurisdiction grounded in the representational character of the class action. She demonstrates: "If a small-stakes money damage class action is properly treated as a pure representational action, which the theory of public law litigation suggests it is, then the contacts supporting the individual's claim against the defendants should support the entire class's claims."[69] In this hypothetical action, an exercise of specific jurisdiction based solely on the named representatives' claims may imply a cohesive class sustained by policy: the need to avoid piecemeal litigation in order to adjudicate potential negative value claims in the most convenient forum, and the notion that all class members share an interest in holding the defendants accountable, consistent with the class action's deterrence rationale.[70]

Although Professor Wood acknowledges that courts are unwilling to adhere to a representational model for all class actions given the difficulties of an ex ante assurance of adequate representation,[71] this limitation may be alleviated by recent case law affirming the antecedence of class certification relative to personal jurisdiction.[72] Given class certification requires adequate representation,[73] prioritizing certification over jurisdiction would allow courts

[67] Wood, *supra* note 10, at 599.
[68] *See id.* at 616–18.
[69] *Id.* at 616.
[70] *Id.*; *see* 2 RUBENSTEIN, *supra* note 42, § 1:8 ("In enabling small-claim suits, class actions expose the defendants to the risk of liability and thereby deter them from engaging in wrongdoing in the first place.").
[71] *See* Wood, *supra* note 10, at 600.
[72] *See* Molock v. Whole Foods Mkt. Grp., 952 F.3d 293, 298 (D.C. Cir. 2020); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020).
[73] FED. R. CIV. P. 23(a)(4).

to make the ex ante determination of adequate representation that lays the groundwork for the representational theory. This perspective has also garnered statutory support in the years following Professor Wood's article, most notably through the Class Action Fairness Act (CAFA).[74] CAFA embodies the representational model of the class action by eschewing the traditional rule of complete diversity among named parties for a permissive regime of minimal diversity.[75]

The proposal instead may face constitutional vulnerability. Because the defendant is susceptible to classwide deprivation, the defendant has a strong argument for the right to classwide due process.[76] This reasoning would require the absent plaintiff class members' claims to arise out of or relate to the defendant's minimum contacts with the forum state in order to satisfy the defendant's due process guarantee.[77]

B. Professor Dodson: Amend Rule 4(k)(1) for National Personal Jurisdiction

Whereas Professor Wood's proposal envisioned doctrinal change, Professor Dodson saw the uncertainty of *Bristol-Myers Squibb* best relieved by an amendment to Rule 4(k)(1). Rule 4(k)(1) restricts the federal court's exercise of personal jurisdiction to the extent to which a state court in the state in which the federal court resides can exert authority.[78] The proposed amendment would "allow nationwide personal jurisdiction to the extent permitted by the Constitution over all parties and claims in a multiclaim or multiparty lawsuit."[79] Per Professor Dodson, the tension inherent in the relationship between personal jurisdiction and aggregation—as exemplified by the

[74] *See* Dodson, *supra* note 8, at 31 (discussing how CAFA classes are subject to unique rules for aggregating amount in controversy for purposes of diversity jurisdiction).
[75] *See* 28 U.S.C. § 1332(d)(2)(A) (requiring only that any named plaintiff be a citizen of a state different from any defendant).
[76] 2 RUBENSTEIN, *supra* note 42, § 6:26.
[77] *See* 4A WRIGHT & MILLER, *supra* note 16, § 1067.
[78] FED. R. CIV. P. 4(k)(1)(a) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .").
[79] Dodson, *supra* note 8, at 38.

"powerful disaggregation effect"[80] wrought by *Bristol-Myers Squibb*—is best remedied by broadening personal jurisdiction to remove "barriers to aggregation."[81]

By extending personal jurisdiction to its constitutional limit, Professor Dodson concedes that defendants could be subject to suit in fora entirely without relationship to the parties or the claims. Jurisdictional abuse could however be corrected by the venue statute, which generally restricts venue to those districts with a meaningful connection to the parties or claims.[82] Although the venue statute does not provide a comprehensive bar against inconvenient fora under a regime of nationwide personal jurisdiction, Professor Dodson finds the benefits of aggregation outweigh the costs imposed by the amendment. His proposed amendment tracks with the dangers of restrictive personal jurisdiction identified in Justice Sotomayor's *Bristol-Myers Squibb* dissent, in which she dismissed consideration of a corporate defendant's inconvenience as irrelevant.[83] Moreover, the prospect of horizontal forum shopping toward insignificant fora with favorable state laws is muted by constitutional choice of law limitations.[84]

C. Professor Abrams: Eliminate Personal Jurisdiction in the Federal Courts

Professor Abrams presents the most radical proposal of the three discussed, arguing for the elimination of personal jurisdiction and territorial limitations on federal service of process.[85] Without these devices, changes to venue principles serve to protect against jurisdictional abuse. Professor Abrams therefore supports a policy of broad original venue, which can take the form of proper venue "in any district in which any party resides, or any district that is the situs of events

[80] *Id.* at 4–5.
[81] *Id.* at 38.
[82] *See id.*; 28 U.S.C. § 1391(b).
[83] 137 S. Ct. 1773, 1784 (2017) ("A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjective a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.").
[84] *See* Dodson, *supra* note 8, at 39 n.228 (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–11 (1981)).
[85] Abrams, *supra* note 15, at 36.

related to the litigation."[86] Broad original venue should be supported by broad latitude for transfer of venue, entailing transfer to any district considered convenient and by any party in the litigation.[87]

Although Professor Abrams voices his doubts as to the constitutional basis for the requirement of personal jurisdiction,[88] a rule eliminating formal personal jurisdiction would mirror the formulation adopted in *Shutts* as to absent plaintiff class members. To extend *Shutts* to all parties in class litigation would be to imply equal burdens and equal due process safeguards irrespective of status, a notion in direct contention with *Shutts* itself.

III

"MATERIALLY IDENTICAL": THE BEST OF BOTH WORLDS

A standard for personal jurisdiction that communicates solicitude for the policies of class litigation and the interests of the parties therein must not sacrifice the latter for the former. Although corporate defendants, as demonstrated by Justice Sotomayor, are better positioned to absorb inconvenience and exploitation than other defendants, there is still a due process right that must be accommodated. Even if modern transportation and communication render corporate defendants' complaints of burdensome fora "unconvincing,"[89] the Court's jurisprudence suggests there are at least some that remain convinced of such inconvenience. Nowhere is this more apparent than in the Court's narrowing of general jurisdiction[90] and tightening of class certification requirements.[91] The Court has also restricted the harms sufficient to satisfy the Article III actual

[86] *Id.* at 42.
[87] *Id.* at 45.
[88] *Id.* at 14–22.
[89] 2 RUBENSTEIN, *supra* note 42, § 6:26.
[90] *See supra* Section I.A.2
[91] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (construing the Rule 23(a)(2) commonality requirement narrowly by requiring claims to depend on a common contention amenable to classwide resolution); *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (concluding that plaintiffs could not satisfy the Rule 23(b) requirement of predominance given they could not demonstrate damages capable of measurement on a classwide basis).

injury requirement for standing, suggesting that the asserted injury must have a common-law or historical analogue.[92] And those taking solace in the ostensible expansion of specific jurisdiction in *Ford* should heed the concurrence of Justice Alito, which cautions against casting the phrase "arise out of or relate to" in the disjunctive in such a manner that forgoes entirely a causal link between the contacts and the claim.[93]

Recent developments suggest a Court majority that believes the doctrine of personal jurisdiction and the class action device should be limited to uphold the value of state sovereignty by protecting the corporate defendant from burdensome litigation.[94] Against this backdrop, it is likely that the Court—despite contrary movement from the lower courts—will extend *Bristol-Myers Squibb* to the class action when it hears the issue.

A. Amend Rule 4(k)(1) by Establishing a "Materially Identical" Standard for Class Actions

To protect against the "disaggregation effect" promised by *Bristol-Myers Squibb* application, a Rule-based solution that simultaneously accommodates the policies of class litigation and personal jurisdiction is necessary.[95] Therefore, Rule 4(k)(1) should be amended to permit personal jurisdiction over defendants for claims subject to Rule 23 in which the defendant has engaged in "conduct materially identical to acts"[96] taken in the forum state.

A "materially identical" standard serves two functions en route to satisfying the interests of class litigation and personal jurisdiction. First, the standard ensures the persistence of the nationwide class action; if nonresident plaintiff claims arise out of or relate to conduct "materially

[92] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).
[93] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1033 (2021) (finding minimum contacts according to *International Shoe* but rejecting a characterization of "relate to" as an independent basis for specific jurisdiction).
[94] *See* DeBernardis v. NBTY, Inc., 2018 WL 461228, *2 (N.D. Ill. 2018) ("[I]t is more likely than not based on the Supreme Court's comments about federalism that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions . . . .").
[95] Dodson, *supra* note 8, at 4–5.
[96] Bristol-Myers Squibb v. Super. Ct. of Cal., 137 S. Ct. 1773, 1786 (2017).

identical" to that engaged by the defendant in the forum state, specific jurisdiction may be exercised. Applied to *Bristol-Myers Squibb* for example, a "materially identical" standard would have conferred jurisdiction over the non-Californians' claims, as conceded by the defendant itself; the conduct—marketing and distributing Plavix—was exhibited in all fifty states.[97] Second, by maintaining the personal jurisdiction requirement over all claims—representative or absentee—levied against defendants, the due process rights of the class defendant are protected, consistent with the implicit recognition in *Shutts* that defendants are subject to a more exacting due process inquiry without the minimal procedural safeguards afforded by Rule 23.[98]

An amendment to Rule 4(k)(1) may also be supplemented by an amendment to Rule 23 that incorporates the "materially identical" standard into the Rule 23(a)(2) commonality requirement. Because Rule 23(a)(2) conditions class certification on the presence of common questions of law or fact,[99] the proposed amendment would be substantively consistent with the precondition for certification, as materially identical conduct engaged in by the defendant can reasonably be considered a common question of fact. If plaintiffs, resident or nonresident, are "injured by the same essential acts[,]" a common question of fact arises.[100] Although a Rule 23 amendment is not necessary given the proposed Rule 4(k)(1) provision would be explicitly subject to claims brought under Rule 23, the change may serve an expressive function for federal judges, signaling the importance of adhering to the formalized standard. Dual amendments may also increase judicial efficiency given certification comes prior to jurisdictional analysis;[101] if the two inquiries can be conducted at the same stage of litigation, the class will be more readily defined at

[97] *Id.* at 1785–86.
[98] 472 U.S. 797, 810–12 (1985).
[99] FED. R. CIV. P. 23(a)(2).
[100] *Bristol-Myers Squibb*, 137 S. Ct. at 1786.
[101] *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 612 (1997) (because class certification is "logically antecedent" to Article III issues, the former must be decided prior to the latter); Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999).

certification, as those plaintiffs whose claims do not arise out of or relate to "materially identical" conduct will be jurisdictionally incapable of remaining in the class.

A Rule-based expansion of personal jurisdiction for federal courts has constitutional support. Rule 4(k) itself presents the strongest inference that an expansion of personal jurisdiction through the Federal Rules is within the rulemaking power of Congress and the Supreme Court (through the Judicial Conference of the United States). Defendants joined under Rule 14 or 19 are subject to personal jurisdiction beyond the traditional confines established in Rule 4(k)(1)(A).[102] Rule 4(k)(1)(C) allows for expanded personal jurisdiction "when authorized by a federal statute."[103] This means that Congress can, consistent with the proposal advocated by Professor Dodson, sanction nationwide personal jurisdiction, and it has done so for many federal claims with the authorization conferred in Rule 4(k)(1)(C).[104] The American Law Institute has even urged, in a draft study on jurisdictional divisions between state and federal courts, that federal assertions of personal jurisdiction lack meaningful constitutional constraints beyond Article III and Fifth Amendment due process interests.[105]

Opinions favoring application of *Bristol-Myers Squibb* however have turned to the Rules Enabling Act (REA) to argue that the use of a particular procedural rule, such as the Rule 23 class action, cannot "abridge, enlarge, or modify a substantive right."[106] The dissent in *Molock*, for

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[102] *Compare* FED. R. CIV. P. 4(k)(1)(B) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued . . . ."), *with* FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .").
[103] FED. R. CIV. P. 4(k)(1)(C).
[104] Dodson, *supra* note 8, at 41 nn.237 & 239 (collecting federal statutes that allow for nationwide personal jurisdiction, including: Federal Arbitration Act, Sherman Act, Clayton Act, and Securities Act of 1933) (discussing the provision of nationwide personal jurisdiction in the joinder context, such as with interpleader).
[105] *See* Abrams, *supra* note 15 (citing AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 138 (tent. drft. 1963)).
[106] 28 U.S.C. § 2072(b).

example, contended that the Rule 23 safeguards may not substitute for principles of personal jurisdiction;[107] any conclusion otherwise would lead to an abridgment of the defendant's substantive due process rights when litigating in a class action. However, judging by judicial silence as to the constitutionality of nationwide personal jurisdiction, a mere expansion of personal jurisdiction in class litigation is unlikely to implicate the REA. In fact, judicial enforcement of expansion indicates express support for constitutionality.[108]

B. Application of the "Materially Identical" Standard to Current Federal Class Actions

To demonstrate how a "materially identical standard" will assure the viability of the nationwide class action, this Paper will engage in a case study analysis of several federal class actions that have considered the application of *Bristol-Myers Squibb*, namely *Molock v. Whole Foods Market Group, Inc.* and *Cruson v. Jackson National Life Insurance Company*.

1. Molock v. Whole Foods Market Group, Inc.

In *Molock*, Whole Foods, a corporation incorporated in Delaware and headquartered in Texas, allegedly manipulated an incentive-based bonus program, leading to lost wages for Whole Foods employees.[109] This profit-sharing program, known as the "Gainsharing program," awards bonuses to employees working in departments that performed under budget.[110] Upon hiring and orientation, employees received communications regarding the Gainsharing bonuses, including express representations that the bonuses were a mandatory element of the employee compensation package.[111] In accepting offers of employment and in working to increase productivity, the

[107] 952 F.3d 293, 307 (D.C. Cir. 2020).
[108] *See* U.S. v. Union Pac. R.R. Co., 98 U.S. 569, 604 (1878) ("Whether parties shall be compelled to answer in a court of the United States wherever they may be served, or shall only be bound to appear when found within the district where the suit has been brought, is merely a matter of legislative discretion . . . .").
[109] *Molock*, 952 F.3d at 295.
[110] Molock v. Whole Foods Market, Inc., 297 F. Supp. 3d 114, 119 (D.D.C. 2018), *aff'd*, 952 F.3d 293 (D.C. Cir. 2020).
[111] *Id.*

plaintiff-employees relied on their employer's representations.[112] Despite an acceptance of employment conferring inclusion in the Gainsharing program, the plaintiffs allege a denial of Gainsharing bonuses throughout the duration of their employment at Whole Foods stores.[113] Plaintiffs allege intentional manipulation of the Gainsharing program through the practice of "shifting" labor costs nationwide and by the establishment of "Fast Teams."[114] Under the former, Whole Foods instructed store leadership to "shift" the labor costs of over-budget departments to those that were under budget, reducing the Gainsharing bonuses owed to employees working in departments with a budget surplus.[115] Although the nationwide scheme to shift labor costs was conceived of and authorized at the executive level, Whole Foods maintains that the manipulation was isolated to only nine of 457 Whole Foods stores in the United States.[116] The named plaintiffs were employed in at least one of the nine admitted stores, but they seek to bring suit on behalf of all other Whole Foods employees working in Whole Foods stores throughout the country, defining the putative class as "past and present employees of Whole Foods who were not paid wages owed to them under the Gainsharing program."[117]

If *Bristol-Myers Squibb*—and by extension traditional principles of specific jurisdiction borrowed from individual litigation—was applied, those plaintiffs who did not work in Whole Foods stores in the District of Columbia would fall out of the class, as their claims would not have any connection to Whole Foods's contacts with the forum. If Whole Foods's conduct was widespread, it could be vulnerable to piecemeal litigation in the form of fifty different statewide

[112] *Id.*
[113] *Id.* at 120.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 120–21.

class actions, a result antagonistic to the efficiency function of the class action.[118] Despite the common legal and factual issues among the claims, fragmentary litigation will waste judicial and party resources.[119]

Application of the "materially identical" standard would remedy the efficiency concerns created by piecemeal litigation. Because a court must accept as true all factual allegations in the complaint on a motion to dismiss for lack of personal jurisdiction,[120] the putative class would include nonresident plaintiffs if their claims arise out of or relate to conduct by the defendant that is materially identical to that taken in the forum state. Assuming the plaintiffs assert manipulation of the Gainsharing program in all 457 Whole Foods stores, then specific jurisdiction would be properly exercised over the claims of the entire putative class, as Whole Foods would have engaged in materially identical conduct in each of the 457 stores. Therefore, under the facts of *Molock*,[121] application of the "materially identical" standard would support a nationwide class action, conserving judicial and litigant resources by avoiding piecemeal and inconsistent adjudication.

2. Cruson v. Jackson National Life Insurance Co.

Defendant Jackson National Life Insurance Company (Jackson) markets and sells variable annuities nationally, distributing through independent brokers, regional brokers, financial institutions, and individual sales agents.[122] Individual sales agents use materials prepared and approved by Jackson to market and sell annuities to customers, primarily senior citizens.[123] Plaintiffs claim that Jackson has breached its contract and the Securities and Exchange

[118] *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010) (describing Rule 23 as "designed to further procedural fairness and efficiency"); Califano v. Yamasaki, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties . . . .").
[119] *See* 2 RUBENSTEIN, *supra* note 42, § 1:9.
[120] *See, e.g.*, Swierkiewicz v. Sorema, 534 U.S. 506, 508 n.1 (2002).
[121] *Molock*, 297 F. Supp. 3d at 119–21.
[122] Tredinnick v. Jackson Nat'l Life Ins. Co., 2018 WL 11352338, *1 (E.D. Tex. 2018), *vacated sub nom.* Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020).
[123] *Id.*

Commission annuity consumer protection guidelines by assessing surrender charges on withdrawals from annuities and on the surrender charges themselves.[124] Plaintiffs allege that in 2014 and 2015, Jackson amassed more than $50 million in surrender charges.[125] The putative class is defined as those who purchased variable annuity investment products from Jackson.[126]

Although the district court found that Jackson waived its defense against personal jurisdiction by delaying its challenge and litigating on the merits before raising an objection,[127] this analysis presumes a timely defense was erected. A *Bristol-Myers Squibb* regime would reject inclusion of non-Texas putative class members, as their claims do not arise out of or relate to the defendant's activities in Texas, rejecting specific jurisdiction. This would result in the same proliferation of statewide class actions that would ensue from the refusal to exercise specific jurisdiction over the nonresident *Molock* claims, provided that the volume of the aggregated statewide claims is sufficient to economically support the litigants' claims.[128]

By contrast, the "materially identical" standard supports specific jurisdiction over the nonresident claims in *Cruson*. The district court's commonality inquiry is instructive in determining whether the defendant engaged in similar conduct beyond Texas borders as it did within them. The court found a common question in the plaintiffs' contention of breach of contract given the uniformity of the defendant's contracts and actions.[129] From state to state, there was similar language as to the calculation of surrender charges in the variable annuity contracts and marketing materials, similar training of support personnel, and no material difference in the calculation of surrender charges.[130] Given commonality was found among plaintiffs regardless of

[124] *Id.* at *2.
[125] *Id.* at *1.
[126] *Id.*
[127] *Id.* at *7.
[128] *Supra* notes 111–12.
[129] *Tredinnick*, 2018 WL 11352338, *10.
[130] *Id.*

the state in which their claims arose,[131] it is reasonable to conclude that the defendants' conduct beyond the forum state was materially identical to that exhibited in the forum state. This streamlined review demonstrates how certification and jurisdictional analyses may be combined under the proposed amendment without sacrificing the substance of either inquiry. Two independent questions are still resolved—the existence of a common question of law or fact and the exhibition of materially identical conduct beyond the forum state—only now with each informing the other.

C. Constitutional, Doctrinal, and Policy Support for the "Materially Identical" Standard

Beyond the rescue of the nationwide class action and its attendant efficiency function, principles of personal jurisdiction and class litigation are mutually represented through the proposed change. A Rule 4(k)(1) amendment that provides for a "materially identical" personal jurisdiction standard has constitutional, doctrinal, and policy footings that enable it to straddle effectively the conflicting interests animating personal jurisdiction and aggregation.[132]

1. Constitutional Considerations

Before assessing the constitutional considerations in adopting a rule of expanded personal jurisdiction for class actions, this Paper roots the decision against applying *Bristol-Myers Squibb* in the due process safeguards afforded by Rule 23. As described previously, the Court's decision in *Shutts* to treat absent plaintiff class members different from defendants for purposes of personal jurisdiction rested on a comparison of the relative burdens each party undertakes in class litigation.[133] The former group benefits from due process safeguards written into Rule 23, such as the provision of notice, the opportunity to be heard, the right to opt out, and the requirement of

[131] *Id.*
[132] *See* Dodson, *supra* note 8, at 15.
[133] *See supra* note 42.

adequate representation.[134] These protections are absent from the mass tort context.[135] *Bristol-Myers Squibb* may be distinguished from *Shutts* and the protections discussed therein on the basis that the former case concerns personal jurisdiction over defendants, the party to which *Shutts* ascribed greater burdens. There may however be an even greater risk of unfairness to defendants in mass tort actions than in class actions—given the significant variance among claims in the former context—necessitating greater discretion in assessing personal jurisdiction.[136]

As the constitutional validity of the "materially identical" standard has already been established,[137] the proposed change also carries a constitutional justification. Seminal cases in personal jurisdiction[138] have identified the ability of the defendant to "reasonably anticipate being haled into court" in the forum state as a touchstone of purposeful minimum contacts, and by extension, the constitutional guarantee of due process. As alluded to by Justice Sotomayor in her *Bristol-Myers Squibb* dissent, a corporate defendant facing class litigation should reasonably anticipate being haled into any court nationwide, especially considering advances in modern transportation and communication.[139] In state court in fact, Bristol-Myers Squibb did not argue that an assertion of specific jurisdiction in California would be unfair.[140] If the due process guarantees inherent in personal jurisdiction are tied to the reasonable anticipation of the defendant, then an expansive personal jurisdiction in the class action context is appropriate.

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[134] *Id.*
[135] Lacy v. Comcast Cable Commc'ns, LLC, 2020 WL 1469621, *2 (W.D. Wash. 2020) ("Federal Rule of Civil Procedure 23 imposes additional due process safeguards on class actions that do not exist in the mass tort context.") (quoting Allen v. ConAgra Foods, Inc., 2018 WL 6460451, *7 (N.D. Cal. 2018).
[136] *See* Sotomayor v. Bank of Am., N.A., 377 F. Supp. 3d 1034, 1038 (C.D. Cal. 2019) (discussing how mass tort actions generally cannot meet the Rule 23 requirements).
[137] *See supra* notes 102–08.
[138] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Calder v. Jones, 465 U.S. 783, 790 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984).
[139] 137 S. Ct. 1773, 1784 (2017) ("[T]here is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.").
[140] Bristol-Myers Squibb Co. v. Super. Ct., 377 P.3d 874, 891 (Cal. 2016).

2. Doctrinal Considerations

Rejection of the *Bristol-Myers Squibb* rule in favor of an amendment that expands personal jurisdiction over defendants in class litigation likewise tracks with the doctrinal evolution of the class action. Being a unique litigation device, the class action is unamenable to solutions not tailored to its particular policies. The maladies that have plagued the class action in recent years have been addressed through confrontation with Rule 23, either by case law[141] or by statute.[142] Both the Court and Congress have recognized that the class action best fulfills its policy rationales when its issues are attended to with hand-crafted answers. The consequences resulting from extension of *Bristol-Myers Squibb* illustrate how the goals of the class action can be compromised without doctrine fitted to the device's needs. *Bristol-Myers Squibb* imports the traditional personal jurisdiction standard into the mass tort context, and several courts purport to extend this to the class action without stipulation.[143] As demonstrated by the case study analysis of the *Molock* and *Cruson* classes, application of traditional personal jurisdiction principles in the class action context would effectively kill the nationwide class action outside of those fora in which the defendant is subject to general jurisdiction.[144] The availability of the nationwide class action protects against the splintering of suits and enables suits with negative value claims, as defendants face risk of liability only through aggregation.[145] If negative value claims cannot be aggregated at sufficient scale to achieve economic viability, those claims may never be adjudicated and thus litigants never

[141] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (construing the Rule 23(a)(2) commonality requirement narrowly); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (finding that a fund must be limited by more than party agreement).
[142] *See, e.g.*, 28 U.S.C. § 1332(d)(2) (permitting greater opportunity for removal through lighter jurisdictional requirements); 15 U.S.C. § 78u-4(a)(3)(B) (directing the court to adopt a presumption that the lead plaintiff should have the largest financial interest of the class).
[143] *Supra* note 68 and accompanying text.
[144] *Supra* Sections III.B.1–2; *see Bristol-Myers Squibb*, 137 S. Ct. at 1788–89 (Sotomayor, J., dissenting).
[145] *See* 2 RUBENSTEIN, *supra* note 42, § 1:8.

compensated. Without the nationwide class action, the efficiency, deterrence, fairness, and compensatory mechanisms stand impotent.

Class action doctrine has also developed according to the oft-repeated principle set in *Devlin v. Scardelletti*: "Nonnamed class members . . . may be parties for some purposes and not for others."[146] Whether absent plaintiff class members are considered parties is an inquiry informed by policy considerations. They are parties for purposes of statute of limitations tolling rules given that a contrary rule would require all class members to intervene to preserve their claims, sacrificing efficiency.[147] By contrast, they are not parties for purposes of determining diversity of citizenship, as this would compromise the class action's ease of administration and destroy diversity in many cases.[148] Following this logic, absent plaintiff class members should not be considered parties for purposes of assessing personal jurisdiction, because, as with subject matter jurisdiction, many class actions would otherwise not be sustainable, and in turn the policies animating the class action would falter.[149]

The *Molock* dissent levies a convincing argument against the relevance of the party status of absent class members: Because a nationwide class action seeks a binding judgment over the defendant as to all claims, not just those of the named representatives, a court's exercise of jurisdiction as to all claims must comport with due process protections.[150] Although nonrecognition of absent class members as parties would provide stronger support for the rejection of *Bristol-Myers Squibb*, the *Molock* dissent is not inconsistent with the proposed amendment.

[146] 536 U.S. 1, 9–10 (2002).
[147] *Id.* at 10.
[148] *Id.*
[149] *See supra* notes 144–45 and accompanying text.
[150] 952 F.3d 293, 307 (D.C. Cir. 2020)

Given the "materially identical" standard entails a jurisdictional inquiry as to the claims of each plaintiff, it incorporates the due process protections discussed in *Molock*.

3. Policy Considerations

With the proposed "materially identical" standard upholding the values of efficiency, deterrence, fairness, and compensation through the perseverance of the nationwide class action, the worry remains that a permissive inquiry compromises the foremost principles of personal jurisdiction, namely fairness and federalism. Scholars have generally observed that the latter theory of personal jurisdiction—with the limitations on its exercise rooted in state sovereignty interests—invites a rigorous assessment of the relationship between the claims, the defendant, and the forum.[151] This perspective on the sovereignty theory of personal jurisdiction also aligns with the progression of personal jurisdiction doctrine in recent years; the Court has placed greater emphasis on interstate federalism and has restricted specific jurisdiction in the same breath.[152]

Yet curtailment of the class action through the policy of state sovereignty is not inevitable. A "materially identical" standard that preserves the nationwide class action consequently protects states' interests in having their residents' claims adjudicated. This presumes that the death of the nationwide class action would prompt the death of the statewide class action in many instances by not producing the "econom[y] of scale" sufficient to make small claims financially viable.[153] Because many claims may not otherwise be adjudicated, consolidated litigation is appropriate, especially as the nationwide class action involves injuries irrespective of state borders. The "materially identical" standard therefore stands at the intersection of class litigation and personal jurisdiction; in service to the former's goals, it realizes the latter's interests.

[151] *See* Wood, *supra* note 10 (outlining the two leading theories of personal jurisdiction).
[152] *See supra* note 9.
[153] Dodson, *supra* note 8.

Jon Spilletti
Writing Sample

CONCLUSION

In refusing review of *Mussat* and leaving open the question of personal jurisdiction over defendants in plaintiff class actions, the Court has eschewed clear and binding precedent, forcing the lower courts to piece together decades of personal jurisdiction and class action doctrine. But thirty-six years removed from *Shutts*, the evolution of personal jurisdiction and class action jurisprudence suggests that judicial resolution will be unsatisfactory. With the progressive narrowing of specific and general jurisdiction and the gradual obstruction of class certification—attended by rhetoric extolling the virtues of state sovereignty—the Court is unlikely to treat the issue with the same delicacy exhibited in *Shutts*.

The Rule 4(k)(1) amendment proposed in this Paper achieves the policies of class litigation without compromising the interests animating personal jurisdiction. Adopting a "materially identical" standard to personal jurisdiction over defendants in class actions saves the nationwide class action from extinction and thereby preserves its efficiency, deterrence, fairness, and compensatory rationales. In protecting these values, the proposed amendment promotes the individual liberty and state sovereignty theories of personal jurisdiction by accommodating due process protections and ensuring the economic viability, and thus the adjudication, of all claims. A Rule-based solution is necessary to prevent the Court from erasing the class action's viability as an effective representative device. Because application of *Bristol-Myers Squibb* stands contrary to the constitutional, doctrinal, and policy considerations animating personal jurisdiction and class litigation, Congress and the rulemakers should intervene to formalize a personal jurisdiction standard for federal class actions. This Paper argues that the balance between the interests of personal jurisdiction and class litigation is best achieved through implementation of the "materially identical" standard.

Applicant Details

First Name	**Ari**
Middle Initial	**J.**
Last Name	**Spitzer**
Citizenship Status	**U. S. Citizen**
Email Address	**Ari.spitzer@gmail.com**
Address	**Address** Street **3647 Caribeth Drive** City **Los Angeles** State/Territory **California** Zip **91436**
Contact Phone Number	**8183249743**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**May 2016**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 22, 2021**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**UCLA Entertainment Law Review (ELR)**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Chacon, Jennifer
jchacon@law.stanford.edu
Horowitz, Cara
HOROWITZ@law.ucla.edu
(310) 206-4033
Babbe, David
babbe@law.ucla.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ARI SPITZER

3647 Caribeth Drive, Los Angeles, CA 91436 | Ari.spitzer@gmail.com | (818) 324–9743

April 26, 2023

Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Room S905 Courtroom 6C South
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a clerkship in your chambers at the United States District Court for the Eastern District of New York beginning October 2025. I am a recent graduate of UCLA School of Law, and am currently working as an associate at BakerHostetler in Los Angeles. Although I have spent much of my life in Los Angeles, without fail, my time spent living or traveling elsewhere has been thoroughly enriching. I am particularly interested in clerking for you, as it would allow me to explore a new place. I am applying for a clerkship in your chambers because I am looking for an opportunity to immerse myself in the intricacies of procedure and policy, to elevate my craft, and to pursue my longstanding passion for public service.

I believe my experiences as an extern for Magistrate Judge Suzanne Segal and at BakerHostetler have prepared me well for clerking. A year into practice, I have gained broad exposure to various areas of substantive law ranging from wildfire litigation to mergers and acquisitions. As a result of working in multiple substantive areas, I have honed my skills as a quick study, learning to distill complexity to get to the heart of the matter. On the merit of my research, writing, and work ethic, a relationship of trust has developed such that colleagues frequently turn to me to research pressing, perplexing questions, and to communicate our answers in succinct and cogent prose.

Enclosed are my resume, transcripts, and a writing sample. My letters of recommendation will arrive separately. My letters of recommendation are written by the following professors: Jennifer M. Chacon, Cara Horowitz, and David Babbe. Please let me know if I can provide any additional information. Thank you very much for your time and for your consideration of my application.

Warmly,

Ari Spitzer

ARI SPITZER
233 South Barrington Avenue, Los Angeles, CA 90049 | Ari.spitzer@gmail.com | (818) 324–9743

EDUCATION

UCLA SCHOOL OF LAW, Los Angeles, CA *GPA*: 3.57
Juris Doctor, May 2021.
UCLA Entertainment Law Review: *Staff Editor* (2019-2020), *Editorial Board*, *Submission Editor* (2020-2021) |
UCLA Law Fellows: *Mentor* | Jewish Law Students Association: *Member.*

LOYOLA LAW SCHOOL, Los Angeles, CA *GPA*: 3.67
Attended September 2018 – May 2019.
Jewish Law Students Association: *Section Representative* | International Law Society: *Vice President.*

WASHINGTON UNIVERSITY IN ST. LOUIS, St. Louis, MO *GPA:* 3.72
Bachelor of Arts in History, May 2016.
Honors: College Honors | Dean's List (2012-2016) | Phi Alpha Theta Honors Society | Izenberg Prize for Best Advanced Seminar Paper (*Prosthesis and Intellectual Property Law in the Postbellum Years*).
Activities: WashU Political Review: *Writer* | Gephardt Institute: *Teacher's Assistant* | Gateway Journal: *Editorial Board.*

PUBLICATIONS

Ari Spitzer, *The Personal Question Doctrine*, 14 NE. U. L. REV. 549 – 629 (2022) (deriving a reserved, individual power over procreative choice from the text, structure, and history of the Tenth Amendment).

EXPERIENCE

BAKERHOSTETLER Los Angeles, CA
Associate (Former Summer Associate) July 2020, October 2021 – Present

- Representation of wood-products company following the 2022 Mill Fire, including: conducting internal, and defending criminal, investigation; drafting memorandum for prosecutors outlining potential charges and defenses; administering Community Relief Fund; drafting settlement agreements and coordinating execution.
- Conducted internal investigation of financial services firm; reviewed documents; participated in witness interviews; and drafted presentation to special committee of firm's board.
- Performed review of data, tracking and diligence, and coordinated specialist reviews for client's acquisition of civilian and military flight testing, pilot training, and avionics engineering firm.
- Negotiated plea bargain on behalf of commercial client relating to criminal misdemeanor complaint.
- Argued procedural and substantive motions in Superior Court of California.
- Drafted guidance on compliance with newly-passed Los Angeles Hotel Workers' Rights ordinance.
- Researched and drafted memoranda relating to labor, employment, litigation, and corporate governance matters.

U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA Los Angeles, CA
Extern to the Honorable Suzanne Segal May 2019 – July 2019

- Composed draft orders concerning appeals of denials of Social Security disability claims, habeas motions, §1983 civil rights claims, motions to dismiss, and discovery.
- Observed judicial hearings; analyzed oral arguments and potential dispositions with Judge Segal and clerks.

CITY OF SANTA MONICA Santa Monica, CA
Management Fellow, City Manager's Office July 2016 – July 2018

- Managed review of staff reports, coordinated scheduling of meeting agendas, and drafted briefs for leadership team.
- Coordinated project teams preparing transition to new, open-office and paperless City Services Building.
- Reformed neighborhood group grant program, simplifying paperwork and accounting requirements.

Intern, Communications July 2015 – August 2015

- Drafted and presented policy brief concerning implementation of an amended zoning ordinance to department heads.

LOS ANGELES MAYOR ERIC GARCETTI Los Angeles, CA
Intern, Communications May 2014 – August 2014

- Drafted quotes, op-eds, and talking points on behalf of Mayor Garcetti, and liaised with media outlets.

Languages: Hebrew (proficient). | **Interests:** Literature, politics, painting, gardening, long-distance running, travel, dogs. | **Community:** Rautenberg New Leaders Project; Brentwood Community Council, Land Use Committee.

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name: SPITZER, ARI JONAH MEYERS
UCLA ID: 303975874
Date of Birth: 06/18/XXXX
Version: 08/2014 | SAITONE
Generation Date: September 23, 2022 | 09:24:29 AM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/26/2019
SCHOOL OF LAW
Major:
LAW

Degrees | Certificates Awarded

JURIS DOCTOR Awarded May 20, 2021
in LAW

Previous Degrees

None Reported

California Residence Status

Resident

Transfer Credit

Institution		Psd
LOYOLA MARYMOUNT UNIVERSITY	1 Term to 08/2019	31.0
CIVIL PROCEDURE- F	A	
CIVIL PROCEDURE- S	A	
CONTRACTS	A	
CRIMINAL LAW	A	
LEGAL RESEARCH & WRITING- F	A-	
LEGAL RESEARCH & WRITING- S	A-	
PROPERTY- F	B	
PROPERTY - S	B	
TORTS	B	
INTRO TO INTERNATIONAL LAW	A+	

Fall Semester 2019

Major:
LAW

EVIDENCE	LAW 211	4.0	13.2	B+
ENVIRONMENTAL LAW	LAW 290	4.0	13.2	B+
REMEDIES	LAW 300	3.0	11.1	A-
NEWS MEDIA LAW	LAW 683	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	49.5	3.536

Spring Semester 2020

CONSTITUT LAW I	LAW 148	4.0	0.0	P
BUSINESS ASSOCIATNS	LAW 230	4.0	0.0	P
INTELLECTUAL PROP	LAW 307	4.0	0.0	P
PRETRIAL CIVIL LIT	LAW 700	4.0	0.0	P

SPRING 2020: DUE TO COVID-19, THE SCHOOL ADOPTED MANDATORY P/U/NC GRADING WITH EXCEPTIONS FOR CERTAIN CATEGORIES OF CLASSES AND STUDENTS.

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	0.0	0.000

Fall Semester 2020

CRIM PRO:INVESTIGTN	LAW 202	4.0	13.2	B+
INTRO FED INCOME TX	LAW 220	4.0	12.0	B
PROFESSIONAL RESPON	LAW 312	2.0	7.4	A-
YR-LONG IND RESRCH Multiple Term - In Progress	LAW 341A	1.0	0.0	IP
INSURNC FOR LITIGTR	LAW 757	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	44.6	3.431

Spring Semester 2021

WILLS AND TRUSTS	LAW 205	4.0	0.0	P
ADVANCED CORP LAW	LAW 231	3.0	11.1	A-
LAND USE	LAW 286	4.0	14.8	A-
YR-LONG IND RESRCH	LAW 341B	2.0	8.6	A+
End of Multiple Term Course				
D&O INSURANCE	LAW 918	1.0	3.7	A-

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	38.2	3.820

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	20.0	20.0	N/a	N/a
Graded Total	37.0	37.0	N/a	N/a
Cumulative Total	57.0	57.0	132.3	3.576

Total Non-UC Transfer Credit Accepted	31.0
Total Completed Units	88.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

Stanford Law School

Jennifer M. Chacón
Professor of Law

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
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jchacon@stanford.edu

October 13, 2022

Dear Judge:

When I was a law professor at the UCLA School of Law, I had the pleasure of instructing Ari Spitzer in three different classes over the course of his two years at UCLA. Based on my experience as Ari's teacher and as the supervisor of his substantial writing project, I am delighted to recommend him for a clerkship in your chambers. Ari is a thoughtful, intelligent, hardworking, and creative student, and I am certain that he will be an excellent clerk.

I first encountered Ari in the Spring of 2020, when he was a student in my Constitutional Law class. Most of the students in the course were first year students, but because Ari was a transfer student, he was in his second year. He was extremely proactive as a student, introducing himself to me early on, and expressing his interest in writing a paper focused on the 10th Amendment's reservation of power to "the people" and related notions of popular sovereignty. He had been discouraged from the project by other faculty members, but because he was extremely interested in pursuing it, and because I thought it could be worthwhile, I agreed to supervise him beginning in the Fall of 2020. But I told him that the first order of business was to finish out his Spring semester courses.

Throughout the Spring 2020 semester, Ari was an exceptionally attentive and engaged students. He read the cases deeply, asked interesting questions, and was always prepared to participate in class. At the same time, he did not hoard the limelight. He participated thoughtfully and was respectful of, and attentive to, the ideas of his classmates. Sadly for all of us, Spring of 2020 saw us transition from in-person to entirely online classes. Ari did just as well in the online format, never flagging in his engagement, despite the disruption. The final exam was a 7 hour, open book exam. Ari did a very good job. His answers were thorough and he cited to the relevant cases effectively. Although he missed a few minor issues, the exam overall was quite well done. During that semester, the UCLA faculty graded all students on a pass/no pass basis. Obviously, Ari passed with flying colors, though it is difficult for me to give you a more granular comparative assessment, particularly in light of the wildly divergent circumstances our students encountered in the early days of the pandemic.

Fortunately, that was not the last I saw of Ari. He enrolled in my Constitutional Criminal Procedure Class in the Fall of 2020, and also completed an independent study paper under my supervision. Ari did well in Criminal Procedure. He expressed enthusiasm for the subject matter, and continued to participate effectively in class conversations. (This, in spite of the fact that we were still entirely online, and remained in virtual session throughout the semester.). He was also diligent about attending office hours. In a class of more than 100 students – one that was conducted entirely online – Ari stood out as one of the most consistently helpful participants in class discussion. When the time came for the final exam, he did a really good job. As with his Constitutional Law exam, he did a good job of citing the relevant cases, and applying and distinguishing those cases in discussing the hypothetical fact patterns in the exam. Ultimately, he received a B+. He would have liked to have

done better, so he met up with me to discuss the minor matters that he might focus on improving for later exams. But, as I told him in our meeting, there were no major oversights in the exam, and no notable problems with his legal analysis. He really is an excellent student.

Throughout that semester, I was also supervising Ari's independent research project. This was a joy. Ari was extremely proactive about setting deadlines for himself and meeting them – from the initial project idea, through the bibliography, outline, and various rough drafts. He was a diligent researcher. He read the existing literature enthusiastically, and was careful in defining his own contribution. He avoided overclaiming and was mindful about how he cited the work of others. When he discovered arguments similar to his, he was careful to ensure that his own contributions were unique and nonduplicative. He also sought feedback from some of the (very senior and well-respected) scholars whom he cited in his footnotes – a brave move for a third-year law student. In the end, his hard work paid off, and his student paper was published as an article in the Northeastern University Law Review. This is quite an achievement for a third-year law student who submitted his article through an open submissions process.

Ari is now working as an associate in the Los Angeles office of Baker Hostetler, where he has focused on commercial litigation, white-collar investigations, labor and employment law, and corporate governance matters. As a clerk, he would bring not only his experience as a diligent law student, but also the wealth of new knowledge that he has acquired as a lawyer.

Before closing, I should note that Ari is also a very kind, thoughtful, and considerate human being. I think that he'd be a wonderful co-worker to his fellow clerks, and a great addition to any chambers. I hope that you will give his application serious consideration.

Should you have further questions about Ari, please do not hesitate to contact me.

Sincere regards,

Jennifer M. Chacón

UNIVERSITY OF CALIFORNIA, LOS ANGELES **UCLA**

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

Cara Horowitz
Andrew Sabin Family Foundation Co-Executive Director
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November 10, 2022

It is my pleasure to give Ari Spitzer my highest recommendation for a judicial clerkship. Ari is a deep thinker and excellent writer who is committed to making a difference in the world. I believe he is a terrific candidate for a clerkship.

Ari came to law school after working for years in local government, both for the office of Los Angeles mayor Eric Garcetti and for the City of Santa Monica. Those experiences have given him a real-world understanding of how law affects the operations of government, the characteristics of a community, and the lives of everyday people. Ari brought these insights into his legal education in ways that enriched our classroom conversations. These experiences also deepened Ari's commitment to work in public service, which (I understand) is one of his goals in seeking a clerkship. Through my conversations with Ari over the years about his career aspirations, I have seen his genuine dedication to the public sector and to improving his community in meaningful ways. In law school, he furthered these goals by serving as a mentor in the UCLA Law Fellows program, the goal of which is to diversify the bar and which pairs first-generation law students with mentors and other resources to help them succeed in the profession.

Ari is an original thinker and excellent writer. His law review article on the Tenth Amendment is an example of this, providing a novel theory for the protection of procreative rights. In the process of supervising Ari's work in my class on Environmental Law, I saw his strong work ethic and seriousness of purpose. Interpersonally, Ari is a pleasure to work with and interacts respectfully and collaboratively with his peers. He is especially good at hearing and responding to constructive feedback without defensiveness. He would be a wonderful addition to chambers staff.

In sum, I recommend Ari wholeheartedly for a clerkship. Please feel free to contact me if any additional information might be useful.

Sincerely,

Cara Horowitz

Cara A. Horowitz

UCLA School of Law

DAVID BABBE
LECTURER IN LAW

SCHOOL OF LAW
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LOS ANGELES, CALIFORNIA 90095-1476
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Email: Babbe@law.ucla.edu

November 10, 2022

Dear Judge:

Re: Recommendation for Ari Spitzer

I am writing to recommend Ari Spitzer for employment as a judicial clerk. Ari was a student in my Pretrial Civil Litigation and Insurance for Litigator courses. I have had the opportunity to observe and evaluate Ari's research and writing skills, his work ethic, and his ability to work effectively with his colleagues. Based on these observations, I recommend Ari for employment as a judicial clerk.

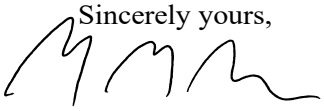
Although I am currently a member of the faculty at UCLA School of Law, I make my comments about Ari from the perspective of a practicing litigator, not an academic. Before joining UCLA's faculty thirteen years ago, I spent twenty-nine years in private practice specializing in complex business litigation, the last twenty years as a partner with Morrison & Foerster. During that time, I worked with dozens of young lawyers, and have developed a strong sense of the qualities in law students and young lawyers that are predictive of success in practice.

Ari has all the qualities that will make him a very effective judicial clerk. He has excellent research and analytical skills. The research memos that he drafted for the Pretrial Civil Litigation and Insurance for Litigators courses consistently reflected deep and insightful factual and legal analysis. In addition, Ari is a very good writer. His writing is well organized, logical, clear, and direct. I also had the opportunity to evaluate Ari's performance in connection with a wide variety of litigation skills: arguing motions, drafting discovery requests, taking depositions, and negotiating settlements. Although Ari will not be using those specific skills as a judicial clerk, the high level of preparation and attention to detail that he brought to his practice of those skills is indicative of how he will approach his employment as a clerk.

On a personal level, Ari is the type of person that always goes above and beyond what is required. Whatever the material we were covering – substantive law, procedural rules, factual analysis, strategic choices, or specific litigation skills – Ari would consistently engage with the material on a deep level to achieve a real mastery of the material. As a student, Ari always took the extra steps necessary to ensure that he had considered all possible factual and legal arguments that he could make on behalf of his clients, that his legal research was both thoughtful and thorough, and that he had carefully identified the potential responses of his opposing counsel. I am confident that Ari will bring the same kind of engagement and rigor to his work as a law clerk. Finally, Ari is a pleasure to work with. He has an engaging personality and a very strong work ethic and sense of responsibility. Ari takes complete ownership of his work.

For all these reasons, I believe Ari would be an excellent judicial clerk. Please feel free to give me a call or send me an e-mail if I can provide any additional information. You can reach me at (310) 206-1339 or babbe@law.ucla.edu.

Sincerely yours,



David Babbe